NO. 75-611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

VICTOR GANEM and
RICHARD DICK, *Petitioners*

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

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LIST OF AUTHORITIES

CASES

UNITED STATES STATUTES

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

JOHN JOSEPH, BRYAN ROBERTS, MILTON KOTHMANN, VICTOR GANEM and RICHARD DICK, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

COMES NOW, the Defendants, VICTOR GANEM and RICHARD DICK, and files this their Original Petion for Writ of Certiorari and as basis for this petition will show unto the Court the following:

I.

Petitioners specifically make reference to the following opinions, copies of which are included in the appendix hereto:

a) *United States v. John Joseph,* Victor Ganem, et al, (5th Cir. September 22, 1975)

b) *United States v. Kahn,* 94 S.Ct. 977 (February 20, 1974)

c) *United States v. Bernstein,* 509 F.2d 996 (4th Cir. January 24, 1975)

d) *United States v. Donovan,* 513 F.2d 337 (6th Cir. 1975)

e) *United States v. Chavez,* 416 U.S. 562 (May 13, 1974) 94 S. Ct. 1849

II.

Jurisdiction of this Honorable Court is based on a conflict between the decision rendered by the 5th Circuit in this case with the decision rendered by the United States Supreme Court in the case of *United States v. Kahn,* 94 S. Ct. 977 (February 20, 1974), and *United States v. Chavez,* 94 S. Ct. 1849. Also the 5th Circuit's decision is in conflict with the Circuit Court cases cited in Paragraph I.

III.

The date of the judgment sought to be reviewed is one handed down by the Fifth Circuit styled *United States of America v. John Joseph,* et al dated September 22, 1975. A copy of such opinion is attached to the appendix herein. There has not been any request for a re-hearing in the Fifth Circuit or has there been any request for an Order granting an Extension of Time within which to file Petition for Certiorari.

IV.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree

in question is Title 18, U. S. C. Section 2518(1)(b)(iv) 4(a) and 10(a)(i),(ii), and Title 18 U.S.C. Section 2516.

V.

Two questions are presented for review:

(1) Should the government's application for wire tap and the Order granting same have included the name of the Defendant, Victor Ganem, since the evidence shows that the government knew or should have known that Victor Ganem's conversations would probably be intercepted.

(2) If the evidence intercepted during the wire tap should not have been suppressed since the Order authorizing the wire tap was insufficient on its face.

VI.

The case generally involves Title 18 U.S.C. 1955 but specifically the petition for Writ of Certiorari concerns the following statutes:

a) Title 18, U. S. C. Section 2516-Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this Chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of.

b) Title 18, U. S. C. Section 2518 (1) (b) (iv) and 4 (a)—Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) . . .

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i). . . (ii) . . . (iii) . . . (iv) the identity of the person, if known, commiting the offense and whose communications are to be intercepted;

(2) . . .

(3) . . .

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

c) Title 18 U. S. C. Section 2518 10 (a) (i) (ii)

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face;

VII.

The following statement of the case is material to the consideration of the question presented: On March 13, 1972, VICTOR GANEM and RICHARD DICK, and other Defendants were indicted on one count of conspiring to violate Title 18, U. S. C. Section 1955 which makes it a crime to conspire to operate, own, conduct or supervise an illegal gambling business, and the Defendants were also indicted on fourteen counts of knowingly and wilfully conducting, owning, operating or supervising an illegal gambling business in violation of Title 18, U. S. C. 1955.

The government's case was based almost entirely on evidence produced as a result of a court ordered wire tap covering the period December 1-14, 1971; all the evidence offered in the case against the defendant VICTOR GANEM, was a result of telephone conversations originating from the Defendant's place of business into the phone actually tapped.

Nowhere in the government's application for the wire tap or order was there any reference, indication, or implication that VICTOR GANEM was one of the parties whose conversations would be intercepted.

The chief witness for the government, Special Agent ALFRED GUNN, readily identified the Defendant, VICTOR GANEM in open court and stated he had interviewed VICTOR GANEM on two occasions as early

as April 1967 and knew that Ganem had a federal gambling tax stamp and acted as agent for the other Victoria bookmakers. Further Gunn testified as late as February 13, 1970 he found the Defendant, VICTOR GANEM, in the company of the other Victoria Bookmakers at the bookmaker's office. Gunn was the special agent who "made" the case for the government and had known all the "Victoria" defendants including VICTOR GANEM for many years. The record reveals that Gunn became close friends with the Defendants and was invited to the booking office and homes of these Defendants on many occasions prior to the indictments being brought against the Defendants.

Further Mr. Jerry Renfro, a former police officer in Victoria, Texas identified the voice of the Defendant, VICTOR GANEM from the tapes and implied that VICTOR GANEM was involved in gambling operations in Victoria, Texas for many years.

Also the government's case against the Defendant, RICHARD DICK was based entirely on the telephone conversations of RICHARD DICK, which were intercepted during the period of the wire tap.

The Order and the application that resulted in the wire tap made the basis of this law suit shows on its face that Mr. Henry Petersen was an *acting* assistant Attorney General and that he was the authorizing officer in the application and his name was in the Court Order as the authorizing officer.

After challenging the facial sufficiency of the wire tap, the government subsequently produced evidence that the then Attorney General John N. Mitchell had personally reviewed and authorized the wire tap and had delegated his authority then to acting assistant Attorney General

Henry E. Petersen to authorize the wire tap and the Order that followed.

VIII.

The Defendant, VICTOR GANEM's position is simple. The government knew or had probable cause to believe that he was assisting in conducting an illegal gambling business and hence he should have been named in the government's application for the wire tap as one of the individuals whose conversations would have been intercepted. The evidence presented by the government makes it quite clear they had probable cause as to this Defendant.

The Supreme Court case, *United States v. Kahn* 94th Supreme Court, 977 (February 1974) enunciates the proper rule of law to be applied in this case. The Court stated at Page 237 "We conclude therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is committing the offense for which the wire tap is sought."

The converse of the rule is that if the government knows or has probable cause to believe an individual's conversation may be intercepted in the wire tap then that individual must be named in the application for the wire tap and the Order granting same.

The same rationale in *Kahn* is also found in *United States v. Bernstein,* 509 F.2d 996 (4th Cir. January 24, 1975) and suppression of the evidence is the proper relief as the Court said at Page 1001 "In conclusion, the Act's identification requirements form an integral part of the system Congress created to protect the privacy by execu-

tive and judicial control of electronic surveillance. Identification of known persons, as required by Section 2518 (1) (b) (iv), is therefore a statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid as to that person. 18 U.S.C. Sections 2518 (10) (a) (i), 2515; cf. *United States v. Giordano,* 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974)."

The Supreme Court's rationale in *Kahn* is also expressed in *U. S. v. Donovan,* 513 F.2d 337 (6th Cir. 1975).

The 5th Circuit based their opinion on *Doolittle v. United States,* 518 F.2d 500 (C.A. 5th 1975), and said in footnote 1 that Ganem has not shown that his rights have been prejudiced by the failure to name him. How much prejudice need be shown when an individual's private conversation is intercepted and he is forced to defend himself in a criminal case based entirely on that particular conversation illegally seized. The Bernstein case at P. 1004 speaks to the issue of prejudice "Suppression, however, does not depend on proof of prejudice from lack of statutory notice. Congress defined an aggrieved person as "a party to any intercepted wire or oral communication or a person against whom the interception was directed." Prejudice is not an element of the definition. Furthermore, the statute gives the district court no discretion to deny, because of lack of prejudice, an aggrieved person's motion to suppress when the interception is unlawful. We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. Cf. *United States v. Giordano,* 416 U.S. 505, 524-529, 94 S.Ct. 1820, 40 L.Ed.2d (1974)."

The Defendants take the position that the Application and the Order of Authorization of the wire tap was insufficient on its face since it designated an acting Assistant Attorney General to do the wire tap, when in fact he is not one of the officers authorized under Title 18, U.S.C. Section 2516 to approve a wire tap. The only one authorized under Section 2516 being the Attorney General or an Assistant Attorney General. The Supreme Court in *United States v. Giordano,* 95 S.Ct. 1820 (1974), considered the language in Section 2516 (1) in great detail. The Court concluded that only the Attorney General and any Assistant Attorney General he might designate would be authorized under the statute to permit a wire tap. *United States v. Chavez* said in effect that although the procedures were not properly followed that suppression was not the proper remedy. In *Chavez* the application and Order were sufficient on their face since the Attorney General had personally authorized the wire tap and delegated that authority to the Assistant Attorney General in rejecting the contention that the Order was facially sufficient; the Supreme Court in *Chavez* explicitly found that the interception Order was not facially insufficient when it said:

> "Here, the interception order clearly identified on its face Assistant Attorney General Wilson as the person who authorized the application to be made. Under Section 2516 (1) he properly could give such approval had he been specifically designated to do so by the Attorney General as the Order recited. That this has subsequently been shown to be incorrect does not detract from the facial sufficiency of the Order. 94 S.Ct. at 1855"

The converse of that rule is equally applicable. Regardless of the legality of the approval and other respects not

shown by the application or the order itself, suppression is mandated when the application and interception order "on their face" recite and identify an individual as the authorizing official who does not possess the requisite statutory authority to authorize wire tap applications. In this case Mr. Henry E. Petersen was an *acting* Assistant Attorney General and had no authority under the statute to authorize the wire tap application. Hence the application and the Order is insufficient on its face and suppression is the remedy under Section 2518 (10) (a) (ii).

Petitioners adopt the other petitions for writ of certiorari submitted by other petitioners in this cause.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court grant this Writ for Certiorari and set the Petition for hearing at the earliest practicable date.

Respectfully submitted,

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Victoria, Texas 77901

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded to the United States Attorney, Houston, Texas, by depositing same in the United States Mail on this the _____ day of October, 1975.

EDWARD J. GANEM

APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

John JOSEPH, Bryan Roberts, Milton Kothman, Victor Ganem, Richard Dick, Defendants-Appellants.

NO. 74-1156.

United States Court of Appeals,
Fifth Circuit.

September 22, 1975.

Defendants were found guilty in the United States District Court for the Southern District of Texas at Victoria, Owen D. Cox, Jr., of operating an illegal gambling business, and of conspiracy. The defendants appealed. The Court of Appeals held that where Attorney General, rather than named official, in fact authorized application for wiretap order, order was not insufficient because it named, as Justice Department official authorizing the application, an acting Assistant Attorney General whose authority had lapsed pursuant to provision of Vacancies Act. Associate of bookmakers, who passed bets on to them and acted only as their disbursement agent, was, as an agent, to be counted in deciding whether at least five persons were conducting a gambling business. Persons who helped bookmakers by providing them with line and other gambling information, serving as means by which bookmakers could increase, decrease or eliminate their risk on particular event, were also to be counted.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before RIVES, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

[1] On February 2, 1973, a jury found the five defendants guilty of conspiracy to operate an illegal gambling business and of the substantive offense of operating an illegal gambling business (See 18 U.S.C. § 371 and § 1955.) The district court entered judgments of conviction on the jury's verdict. We discuss only two issues[1] on appeal: (1) whether an irregularity in the order authorizing recording of their telephone conversations rendered the recordings inadmissible in evidence, and (2) whether there was sufficient evidence to support the jury's verdicts. We affirm the judgments of conviction.

FACTS

Richard Dick and three other men, who were not tried with him, operated in Victoria, Texas, a gambling establishment (hereafter referred to as Victoria or Victoria bookmakers). They worked in a central place of business, accepting wagers—usually communicated by telephone—on high school, college and professional sporting events. Ganem operated a pool hall in Victoria

1. We have delayed decision of this appeal to await an en banc decision relating to a third issue. Appellant Ganem asserted that the recordings of his telephone conversations could not be admitted into evidence against him or the other appellants, because the application for the wiretap order failed to name him as a target of the interception. Since Ganem has not shown that his rights have been prejudiced by the failure to name him, his argument is foreclosed by the recent Fifth Circuit en banc decision in *United States v. Doolittle*, 5 Cir. 1975, 518 F.2d 500. Other issues raised have been considered but, in our opinion, do not merit discussion.

and acted as an agent for the Victoria bookmakers, relaying wagers placed by patrons of his pool hall and handling the necessary financial arrangements—collecting from losers and paying winners. Line[2] and other gambling information was exchanged by Victoria and three of the appellants who were professional gamblers living in other Texas cities (Joseph in Austin, Roberts in Ft. Worth, and Kothman in San Antonio). Generally, they were not the Victoria bookmakers' only source of "line." They and Victoria also placed bets with each other. Although the transcript of the wiretaps reveal that several of the appellants talked of some of those wagers as "balancing the books," [3] a reconstruction and tabulation of the telephone transactions makes it seem unlikely that the Victoria books were balanced. The record does reveal, however, that the Victoria bookmakers did use their bets with Joseph, Roberts and Kothman to increase or decrease their wagers on contests on which their

2. A bookmaker's "line" is his price list—that is, the odds (or "points") he will give to individual bettors. The violations in the instant case took place during football season. A hypothetical example of the line on a Baylor-SMU football game would be Baylor +2½ points; that is, the gambler would be predicting that SMU would win the contest by 2½ points. A bettor who bet on Baylor would win if Baylor either won the game or lost by less than three points, and would lose if SMU won by three or more points.

3. "Balancing the books" is a term of gambling art which refers to the self-protective actions of a bookmaker who receives more bets on one side of a contest than on the other. He balances his books by placing a "layoff bet" with another gambler. This "layoff bet" would be for the excess of the dollars bet on the more popular side over the dollars bet on the less popular side. For example, a bookmaker accepting wagers on the Oklahoma-Texas football game might find himself with $40,000 wagered on Texas and $100,000 on Oklahoma. To balance his books, he would place with another bookmaker a bet of $60,000 on Oklahoma. His profit would come from the 10% surcharge ("juice") that bookmakers exact on losing bets; that is, a person who placed a $10 bet would receive $10 if he won, but would pay $11 if he lost.

customers' wagers were not sufficient for the yield which they desired.

AUTHORIZATION PROCEDURE

[2] The first issue is whether the wiretap order was insufficient on its face because it named, as the Justice Department official authorizing the wiretap application, an Acting Assistant Attorney General whose authority had lapsed pursuant to the provisions of the Vacancies Act, 5 U.S.C. § 3348. The appellants, in their briefs (Joseph's brief, pp. 29-31) and in oral argument, do not contest the government's statement that the Attorney General, rather than the named official in fact authorized the application. Under facts identical with the ones in the instant case, this Court in *United States v. Robertson,* 5 Cir. 1974, 504 F.2d 289, *reh. en banc denied,* 506 F.2d 1056, held that this particular defect did not make an order facially insufficient. However, the fact that the Acting Assistant Attorney General's authority had expired was presented to the *Robertson* court only in the petition for a rehearing en banc. The rationale of the *Robertson* decision was that "the congressional intent [to limit the use of wiretap] is satisfied when the head of the Justice Department personally reviews the proposed application and determines that the situation is appropriate for employing [the] extraordinary investigative measure [of wiretapping]." *Robertson, supra* at 292. That rationale applies to the instant situation.[4] We hold that *Robertson*

4. An argument can be made that the de facto officer doctrine would apply to this particular situation and that the Acting Assistant Attorney General's authority would be held not to have expired, despite the contrary provision of the Vacancies Act. *See* Annotation 71 A.L.R. 848 (1927); Comment, *Temporary Appointment Power,* 41 U. Chi. L. Rev. 146 (1973). *But see* Comment, *The De Facto Officer Doctrine,* 63 Colum. L. Rev. 909 (1963).

controls and that the recordings were admissible in evidence.

SUFFICIENCY OF THE EVIDENCE

The second issue is whether there was evidence sufficient to support the jury's conclusion that at least five (5) persons conducted the Victoria bookmaking business and that each of the appellants helped conduct that business. A violation of 18 U.S.C. § 1955 occurs only where five or more persons conduct an illegal gambling business.[5]

[3-6] Appellants concede that there were four persons conducting the gambling business—Dick and his three associates who were not tried with him. We conclude that Dick and each of the other appellants helped conduct this business. Ganem was an associate of the bookmakers, passing on to them bets and acting as one of their disbursement agents. Agents, such as he, must be counted in deciding whether at least five persons are conducting a gambling business. *See United States v. Becker,* 2 Cir. 1972, 461 F.2d 230; *United States v. Riehl,* 3 Cir. 1972, 460 F.2d 454. Joseph, Roberts and Kothman helped the Victoria bookmakers by providing them with line and

5. "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

18 U.S.C. § 1955(a) and (b).

other gambling information. They served, too, as a means by which the Victoria bookmakers could increase, decrease or eliminate their risk on a particular event. A person who performs a necessary function other than as a mere customer or bettor in the operation of illegal gambling "conducts an illegal gambling business." *United States v. Jones,* 9 Cir. 1974, 491 F.2d 1382, 1384.

> "The only exclusions intended by Congress were the individual player or bettor and not the professional bookmaker who also in the course of his business bets.
>
> "Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless [of] how minor their roles and whether or not they [are] labelled agents, runners, independent contractors or the like, and to exclude only customers of the business.' *United States v. Becker,* 461 F.2d 230, 232 (2d Cir. 1972). 'As the House Committee Report stated, the term "conducts" is broad enough to include both "high level bosses and street level employees." ' *United States v. Hunter,* 478 F.2d 1019, 1022 (7th Cir. 1973) (includes runners, telephone clerks, salesmen and a watchman as 'conducting' a gambling operation).
>
> "Certainly the layoff-bettor is a more obvious target of § 1955 than runners, salesmen, clerks, and watchmen."

United States v. McHale, 7 Cir. 1974, 495 F.2d 15, 18. While Joseph, Roberts and Kothman may not have been layoff bettors, they were more than individual players or bettors and consciously aided in the conduct of the Victoria bookmaking business. There is sufficient evidence to support the jury's verdict. The judgments of conviction are affirmed.

Affirmed.

UNITED STATES of America, Appellant,

v.

Calman BERNSTEIN, Appellee.

NO. 74-1066

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 30, 1974.

Decided Jan. 24, 1975.

Defendant's motion to suppress certain wiretap evidence was granted by the District Court for the District of Maryland, C. Stanley Blair, J., and Government appealed. The Court of Appeals, Butzner, Circuit Judge, held that government agents were required to disclose the identity of a person who might be overheard as result of wiretap in application for the wiretap when they had probable cause to believe that he was committing a specific crime and would be overheard on a specific telephone; that agents had probable cause to believe that they would overhear defendant and that defendant was committing a specific crime; and that failure to disclose that fact in the application rendered the wiretap invalid as to defendant, whether or not he was actually prejudiced by the failure to disclose.

Affirmed.

* * *

Marc Philip Richman, Atty., U. S. Dept. of Justice (George Beall, U. S. Atty. for the District of Maryland, David E. Holt, Jr., Sp. Atty. and Peter M. Shannon, Jr., Atty., Dept. of Justice, on brief) for appellant.

Arnold M. Weiner, Baltimore, Md. (M. Albert Figinski, Baltimore, Md., on brief), for appellee.

Before CRAVEN, BUTZNER and FIELD, Circuit Judges.

BUTZNER, Circuit Judge:

The United States appeals from a district court order that suppressed Calman Bernstein's intercepted phone calls as evidence against him. The court found that when the government applied for the intercept order extensions, under which the conversations were later seized, its agents knew that Bernstein was committing the crime under investigation and would use the telephone they sought to tap. Because Bernstein was not identified in either the applications or the extensions, in violation of Title III of the Omnibus Crime Control and Safe Streets Act, the court suppressed the conversations. Its opinions are reported as United States v. Curreri, 368 F. Supp. 757 (D. Md. 1973), and United States v. Bleau, 363 F. Supp. 438 (D. Md. 1973).

The wiretaps were part of an investigation of numbers bookmaking. The first intercept order was obtained on March 30, 1972, and extensions were granted on April 14, May 1, and May 17. After Bernstein and others were indicted for conducting an illegal gambling business, he moved to suppress conversations seized under both the original order and the extensions. The district court found that although government agents had probable cause to

believe that Bernstein was involved in the business before they applied for the March 30 order, they did not know that he would use the tapped telephones. Consequently, it denied Bernstein's motion to suppress the conversations obtained by the first interception. Bernstein has not appealed this order.

The court then found that before the agents applied for the April 14 extension order, information from the first interception had given them probable cause to believe that Bernstein would be overheard on a tapped telephone. Their failure to identify him in that and subsequent applications, it held, rendered the interceptions obtained after April 14 unlawful with respect to him. Accordingly, the court suppressed them. We affirm.

I

[1] The application for a wiretap order must include "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted."[1] Extensions of an

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1. 18 U.S.C. § 2518 provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . . . .

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed,

intercept order require a new application containing the same information needed for the original one.[2] The order must specify "the identity of the person, if known, whose communications are to be intercepted."[3] Since it is only through the application that the judge learns the identity of the person whose conversations are to be intercepted, the identification requirement for the order is no broader than for the application. United States v. Kahn, 415 U.S. 143, 152, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). The critical issue in this case, therefore, is whether the omission from a wiretap application of the name of a known offender whose communications are to be overheard dictates suppressing his conversations as unlawfully intercepted when the government purposes to use them against him.[4]

(ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted . . .".

2. 18 U.S.C. § 2518(5) provides in pertinent part:
"... Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section . . ."

3. 18 U.S.C. § 2518(4)(a).

4. 18 U.S.C. § 2518(10)(a) provides:
"Any aggrieved person in any trial in or before any court . . . of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
(i) the communication was unlawfully intercepted;
. . . . . .
If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

[2, 3] Not every violation of Title III results in an unlawful interception. A violation is material only if Congress intended the statutory provision that was not followed to be "a precondition to obtaining . . . intercept authority." United States v. Giordano, 416 U.S. 505, 515, 94 S.Ct. 1820, 1826, 40 L.Ed.2d 341 (1974).[5] Statutory preconditions, teaches the Court, "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527, 94 S.Ct. at 1826. In contrast, violation of a statutory provision that does not "affect the fulfillment of any of the reviewing or approval functions required by Congress," does not render an interception unlawful within the meaning of § 2518(10)(a)(i). United States v. Chavez, 416 U.S. 562, 575, 94 S.Ct. 1849, 1856, 40 L.Ed.2d 380 (1974).[6] Whether a statutory provision is a precondition to a valid order depends, then, on its role in the Act's system of restraints on electronic surveillance.

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18 U.S.C. § 2515 provides:
"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received . . . in any trial . . . if the disclosure of that information would be in violation of this chapter."
18 U.S.C. § 2517(3) allows intercepted communications to be used as evidence only if obtained "by any means authorized by this chapter."

5. In *Giordano* the Court affirmed suppression because the Attorney General or a designated Assistant Attorney General failed to review and approve the application for an intercept order, in violation of 18 U.S.C. § 2516(1).

6. *Chavez* held that application's misnomer of the authorizing Assistant Attorney General, in violation of 18 U.S.C. § 2518(1)(a), did not require suppression.

Title III was drafted to protect the privacy of wire and oral communications while allowing the use of electronic surveillance in the investigation of certain crimes. It restricts eavesdropping by law enforcement officers both to conform to the fourth amendment and to prevent abuse even of constitutional surveillance. The government contends that the identification requirement serves neither end and that its violation is a mere technical omission. But when the entire statute is considered, identification is seen to facilitate both constitutional and congressional limits on eavesdropping.

[4] Electronic interception of communications is a form of search and seizure subject to the fourth amendment. Unless a party to the conversation consents, the amendment only permits interceptions with prior judicial approval to gather information about a specific crime for a limited time from a particular place. Therefore, the amendment prohibits eavesdropping to collect general intelligence about individuals. *See generally* United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Several provisions of Title III directly implement these restrictions.[7] Though dictum in United States v. Kahn, 415 U.S. 143, 155 n. 15, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974), indicates that the fourth amendment might not require naming a known offender

7. *E.g.*, 18 U.S.C. §§ 2518(3) (judicial finding of probable cause that evidence of specific crime can be gathered from specific place), and 2518(5) (limitations on time and scope).

whose conversations are to be intercepted,[8] identification nevertheless fosters conformity with both constitutional and statutory requirements. In particular, it is important to the exercise of (A) executive approval, (B) prior judicial authorization, and (C) subsequent judicial review of interceptions.

A

In order to allow only necessary electronic surveillance, Congress imposed preconditions not required by the Constitution, including restriction of federal authority to request intercept orders to the Attorney General or a designated Assistant Attorney General. 18 U.S.C. § 2516(1); United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). When deciding whether to approve surveillance, however, the Attorney General depends on information from law enforcement officials. If his subordinates do not identify known persons whose conversations they wish to intercept, they effectively substitute their judgment for his. It is therefore apparent that identification, as required by § 2518(1)(b)(iv), is essential to the discharge of responsibility which the Act places on the Attorney General or his designate.[9]

8. *But see* West v. Cabell, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894). This case, cited in the legislative history of § 2518(4)(a), S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News, p. 2191, held that both the common law and the fourth amendment required that the person to be seized under an *arrest* warrant should be accurately named. Since the other information demanded in § 2518(1)(b) is required by the fourth amendment. Congress may have believed that identification of the person speaking is also constitutionally required.

9. The fact that an application for an extension is involved in this case is not significant. The Acting Attorney General separately authorized the April 14th extension and, on the recommendation of an Assistant Attorney General, approved the addition of names not included in the original application. Bernstein's name, however, was not mentioned.

B

Both the fourth amendment and Title III require prior judicial authorization of electronic eavesdropping in order to forestall abuses by enforcement officials. 18 U.S.C. §§ 2511, 2518(3); United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Issuing an intercept order is not simply a ministerial act, for the judge must decide that the constitutional and statutory justifications for the intrusion exist. So that the judge can be as informed as possible in an *ex parte* hearing, Congress required the applicant for an intercept order to furnish the necessary facts in considerable detail. *See* 18 U.S.C. § 2518(1); cf. Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Included in the information the government must furnish is a complete history of the electronic surveillance of the persons named in the application.[10] Omission of this information is a statutory violation that invalidates any interceptions with respect to the persons not listed. United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). As that case explains, Congress believed that information about prior surveillance is "necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs." 501 F.2d at 837. But

10. 18 U.S.C. § 2518(1)(e) requires:

"A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application . . .".

a history of prior taps involving the same person is available to the court only when he is named in the application. Identification required by the Act, therefore, facilitates judicial control by providing the complete history that Congress deemed necessary for an informed decision.

C

In Berger v. New York, 388 U.S. 41, 60, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), the Supreme Court held that notice of a search is an essential element of judicial control over the execution of intercept orders. Secrecy, it reasoned, could make vindication of fourth amendment rights impossible, especially when the government did not intend to use the intercepted conversations as evidence. Conforming to the Constitution, Title III requires service of notice on "the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine," informing them that an interception was applied for and either denied or carried out. 18 U.S.C. § 2518(8)(d). This notice, the legislative history explains, "should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known *at least to the subject*. He can then seek appropriate civil redress . . . if he feels that his privacy has been unlawfully invaded." [Italics added.] S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News, p. 2194.[11]

Unless the government uses the intercepts as evidence against him, an unnamed subject has no assurance that he will receive notice, and the government may secretly

11. 18 U.S.C. § 2520 provides a civil remedy for violations of Title III.

circulate unlawfully intercepted conversations to other law enforcement agencies and use them in its own operations.[12] Post-interception judicial review in an adversary hearing, an essential part of Title III's remedial scheme, cannot be had without notice to the person overheard. When the government expects to listen to a known offender, it has the statutory duty to name him in the application so that he will receive the notice to which he is entitled. Failure to do so can obstruct judicial review of the government's actions and thwart the congressional policy of protecting the individual's privacy.

[5] In conclusion, the Act's identification requirements form an integral part of the system Congress created to protect privacy by executive and judicial control of electronic surveillance. Identification of known persons, as required by § 2518(1)(b)(iv), is therefore a statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid as to that person. 18 U.S.C. §§ 2518(10)(a)(i), 2515; *cf.* United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

II

We next consider whether Bernstein was "known" within the meaning of § 2518(1)(b)(iv), which requires the application for an intercept order to include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." The problem consists of three parts: what information does the statute require; how certain must the applicant be about this information; and whether the district court correctly assessed the applicants' knowledge when they applied for the April 14th extension.

12. If the intercepts are used as evidence, the government must give notice at least ten days before trial. 18 U.S.C. § 2518(9).

[6] We agree with the district court that § 2518(1)(b)(iv) imposes no duty of identification until the applicant knows both that the individual "is committing the offense" and that his "communications are to be intercepted." The Supreme Court settled the first point in United States v. Kahn, 415 U.S. 143, 156-157, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). Its opinion supports the second by implication, for if the government has no knowledge that a certain person will be overheard on the tapped phone, it cannot intend to invade his privacy and would serve no statutory purpose by identifying him. *See* United States v. Martinez, 498 F.2d 464, 468 (6th Cir. 1974).

How positive of the relevant facts must the government's agents be? The government maintains that it must name the person only when its knowledge approaches certainty. Bernstein contends that the government must identify the subject of an interception when its knowledge supports a finding of probable cause of his criminal activities and use of the phone to be tapped.

Again, *Kahn* provides guidance by indicating that probable cause is sufficient knowledge.[13] The Court's observation, though dictum, is consistent with the historical use of this test to evaluate other invasions of privacy. *See, e. g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Sibron v. New York, 392

13. In United States v. Kahn, 415 U.S. 143, 155, 94 S.Ct. 977, 978 (1974), the Court stated that:

> "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that the individual is 'committing the offense' for which the wiretap is sought."

U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). The probable cause standard is a well tried compromise between the interests of personal privacy and effective law enforcement. *See* Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Examination of the evidence by a neutral, objective judicial officer provides a more uniform and certain measure of the investigator's knowledge than his own subjective judgment. *See* Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). We therefore hold that when there is probable cause to believe that an individual is committing a specific crime and may be overheard on a specific phone, he is known to the government for the purpose of § 2518(1)(b)(iv).

[7] We next consider whether the district court correctly found that the F.B.I. had probable cause to believe Bernstein was participating in the activity under investigation and would use a phone covered by the extension of the intercept order. Since the district judge's opinion sets forth the facts in meticulous detail, only a brief resume of the evidence is necessary for our purposes. *See* United States v. Curreri, 368 F. Supp. 757, 761 (D. Md. 1973).

Before the government applied for its initial intercept order on March 30, F.B.I. agents investigating Robert Curreri, a bookmaker whose telephones they wished to tap, learned from two informants of proven reliability that Bernstein was handling Curreri's layoff.[14] Baltimore police also told agents that Bernstein was reputedly involved in gambling. It is apparent the district court correctly found that from this information the agents had probable cause

14. A bookmaker must diminish his risks by re-betting, or "laying off," large bets with another bookmaker. The person who takes layoff bets is an integral part of a bookmaking business. United States v. Bobo, 477 F.2d 974, 990 (4th Cir. 1973).

to believe Bernstein was part of an illegal gambling business. Indeed, the government now concedes this point.[15] But not until Curreri's phones were actually tapped did the F.B.I. learn that Bernstein would use one of them to discuss gambling with Curreri. On April 11, 1972, agents monitored a call on one of Curreri's phones from a man whom they were able to identify as Bernstein. Initially, an unidentified man told Bernstein that Curreri was busy. When Bernstein gave his name and said that he had a message to call, he was told to hold on because Curreri wanted to speak to him. Curreri and Bernstein then discussed a payoff on a wrong number the previous day and ways to avoid the same mistake in the future. During the conversation Bernstein said that he had told his girl to "call everybody" when he had learned of the mistake and that he had called Curreri's mother once before about a similar problem. Curreri then instructed Bernstein to give his girl Curreri's number, saying, "I'm either here or home or someplace." Bernstein reassured Curreri that anytime a wrong number was reported, "If it's four o'clock in the morning, I'll call." The transcript ends with Bernstein saying, "I'll talk to you later," and Curreri responding, "O.K., Cal." The government mentioned neither Bernstein nor this call in its April 14th application.

Taken as a whole, the evidence supports the district court's finding. F.B.I. agents already had probable cause to believe Bernstein was involved in Curreri's operation. The April 11th conversation, which referred to payments between the two men, confirmed this and also showed that Bernstein phoned Curreri. A detached observer could conclude from the evidence available before April 14 that

15. "There is no question but that the government had probable cause to believe that Bernstein was a member of Curreri's gambling operation . . ." Reply Brief for the United States 5.

the government had probable cause to believe that Bernstein was still handling Curreri's layoff and on occasion would talk with him about the business on tapped phone. *Cf.* United States v. Kleve, 465 F.2d 187, 193 (8th Cir. 1972).

III

The government contends that even if it violated § 2518 (1)(b)(iv) with respect to Bernstein, § 2517(3) authorizes the use of the taps as evidence against him.[16] Briefly, the government argues that the communications between Bernstein and Curreri include both sides of the conversation; that a valid order covered Curreri; and that once lawfully intercepted, Bernstein's conversations could be used against anyone, including Bernstein himself.

[8, 9] The fundamental error in the government's position is the assumption that Title III provides only a right not to have the unlawful intercepts used in court. But Title III does more: it creates a right not to be overheard except in conformity with its provisions. 18 U.S.C. § 2511 (1).[17] As we held in part I of this opinion, the identification required by § 2518(1)(b)(iv) is a precondition to lawful interception with respect to a known person. Therefore, contrary to the government's assertion, § 2517(3) supplies no basis for admission since by its terms it applies only to "communications intercepted in accordance with this chapter."

16. 18 U.S.C. § 2517(3) provides:

"Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding."

17. 18 U.S.C. § 2511(1) provides in pertinent part:

"(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . ."

shall be subject to criminal penalties.

[10] The government compares this case, however, to one where an independent ground for a search, such as a valid arrest, renders defective warrant, or the absence of a warrant, immaterial. We find the analogy unpersuasive. A warrantless search incident to a lawful arrest is valid because the occasion requires the contemporaneous removal of weapons or disposable evidence from the prisoner and the area under his immediate control. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Similar exigent circumstances are lacking when agents tap a phone with probable cause to believe that they will overhear a particular person talking about specific criminal activity.

[11] Nor can the government rely on a comparison to the plain view doctrine. The seizure of evidence in plain view is justified only when discovery is inadvertent. Coolidge v. New Hampshire, 403 U.S. 443, 469, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The government's position finds no support in United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). Mrs. Kahn's conversations were lawfully intercepted because the government had no reason to suspect her criminal activities when the agents overheard her. Here, in contrast, the agents had reason to anticipate Bernstein's use of a tapped phone to discuss his participation in the crime they were investigating, and they intended to intercept his calls. The

conversations suppressed by the district court were not inadvertently discovered.

We conclude, therefore, that when the government has the statutory duty to identify an individual, its failure to do so is not excused by the fact that it lawfully eavesdropped on another party to the conversation.

IV

Bernstein did not receive statutory notice of the wiretaps in which his conversations were intercepted. The government argues that because he later received actual notice he was not prejudiced, and consequently his conversations are admissible.

[12] Suppression, however, does not depend on proof of prejudice from lack of statutory notice. Congress defined an aggrieved person as "a party to any intercepted wire or oral communication or a person against whom the interception was directed."[18] Prejudice is not an element of the definition. Furthermore, the statute gives the district court no discretion to deny, because of lack of prejudice, an aggrieved person's motion to suppress when the interception is unlawful.[19] We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. *Cf.* United States v. Giordano, 416 U.S. 505, 524-529, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

The order of the district court is affirmed.

18. 18 U.S.C. § 2510(11).

19. See footnote 4 *supra*.

UNITED STATES v. KAHN

415 U.S. 143, 39 L.Ed.2d 225, 94 S. Ct. 977

APPEARANCES OF COUNSEL

Andrew L. Frey argued the cause for petitioner.
Anna R. Lavin argued the cause for respondents.
Briefs of Counsel, p. 936, infra.

OPINION OF THE COURT

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Mr. Justice Stewart delivered the opinion of the Court.

On March 20, 1970, an attorney from the United States Department of Justice submitted an application for an order authorizing a wiretap intereception pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520 [18 U. S. C. S. §§ 2510—2520], to Judge William J. Campbell of the United States District Court for the Northern District of Illinois. The affidavit accompanying the application contained information indicating that respondent Irving Kahn was a bookmaker who operated from his residence and used two home telephones to conduct his business.[1]

1. The affiant, a special agent of the Federal Bureau of Investigation, provided detailed information about Kahn's alleged gambling activities. This information was derived from the personal observations of three unnamed sources, whose past reliability in gambling investigations was described by the affiant. In addition, the information was corroborated by telephone company records showing calls on Kahn's telephones to and from a known gambling figure in another State.

The Government's application and the accompanying affidavit also claimed that one Jake Jacobs was using a telephone at his private residence to conduct an illegal gambling business. The subsequent order of the District Court authorizing wire interceptions also covered Jacobs' phone. Any communications intercepted over the Jacobs' telephone, however, play no role in the issues now before us.

The

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affidavit also noted that the Government's informants had stated that they would refuse to testify against Kahn, that telephone company records alone would be insufficient to support a bookmaking conviction, and that physical surveillance or normal search-and-seizure techniques would be unlikely to produce useful evidence. The application therefore concluded that "normal investigative procedures reasonably appear to be unlikely to succeed," and asked for authorization to intercept wire communications of Irving Kahn and "others as yet unknown" over two named telephone lines, in order that information concerning the gambling offenses might be obtained.

Judge Campbell entered an order, pursuant to 18 U.S.C. § 2518 [18 U.S.C.S. § 2518], approving the application.[2]

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2. Title 18 U.S.C. § 2518 [18 U.S.C.S. § 2518] provides, in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . . . .

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . . . .

He specifically

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found that there was probable cause to believe that Irving Kahn and "others as yet unknown" were using the two telephones to conduct an illegal gambling

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"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

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business, and that normal investigative techniques were unlikely to succeed in providing federal officials with sufficient evidence to successfully prosecute such crimes. The order authorized special agents of the FBI to "intercept wire communications of Irving Kahn and others as yet unknown" to and from the two named telephones concerning gambling activities.

The authorization order further provided that status reports were to be filed with Judge Campbell on the fifth and 10th day following the date of the order, showing what progress had been made towards achievement of the order's objective, and describing any need for further interceptions.[3] The first such report, filed with Judge Campbell on March 25, 1970, indicated that the wiretap had been terminated because its objectives had been attained. The status report gave a summary of the information garnered by the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife at their home in Chicago and discussed gambling wins and losses, and that on the same date Minnie Kahn, Irving's wife, made two telephone calls from the intercepted telephones to a person described in the status report as "a known gambling figure," with whom she discussed various kinds of betting information.

3. Title 18 U.S.C. § 2518(6) [18 U.S.C.S. § 2518(6)] provides, in pertinent part:

"Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require."

Both, Irving and Minnie Kahn were subsequently indicted for using a facility in interstate commerce to promote, manage, and facilitate an illegal gambling business,

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in violation of 18 U.S.C. § 1952 [18 U.S.C.S. § 1952].[4] The Government prosecutor notified the Kahns that he intended to introduce into evidence at trial the conversations intercepted under the court order. The Kahns in turn filed motions to suppress the conversations. These

4. The Travel Act, 18 U.S.C. § 1952 [18 U.S.C.S. § 1952], provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."

The indictment in this case stated that the alleged gambling activities attributed to the Kahns were in violation of Ill. Rev. Stat., c. 38, §§ 28-1(a), (2), and (10).

motions were heard by Judge Thomas R. McMillen in the Northern District of Illinois, who, in an unreported opinion, granted the motion to suppress. He viewed any conversations between Irving and Minnie Kahn as within the "marital privilege," and hence inadmissible

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at trial.[5] In addition, all other conversations in which Minnie Kahn was a participant were suppressed as being outside the scope of Judge Campbell's order, on the ground that Minnie Kahn was not a person "as yet unknown" to the federal authorities at the time of the original application.

The Government filed an interlocutory appeal from the suppression order.[6] A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed that part of the District Court's order suppressing all conversations of Minnie Kahn, but reversed that part of the order based on the marital privilege. 471 F.2d 191. The court held that under the wiretap order all intercepted conversations had to meet two requirements before they could be admitted into evidence:

> "(1) that Irving Kahn be a party to the conversations, and (2) that his conversations intercepted be with 'others as yet unknown.' " Id., at 195.

5. Title 18 U.S.C. § 2517(4) [18 U.S.C.S. § 2517(4)] provides that:

> "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

6. Title 18 U.S.C. § 2518(10)(b) [18 U.S.C.S. § 2518(10)(b)] gives the United States the right to take an interlocutory appeal from an order granting a motion to suppress intercepted wire communications. In addition, 18 U.S.C. § 3731 [18 U.S.C.S. §3731] generally provides for appeals by the Government from pretrial orders suppressing evidence.

The court then construed the statutory requirements of 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a) [18 U.S.C.S. §§ 2518(1)(b)(iv) and 2518(4)(a)] that the person whose communications are to be intercepted is to be identified if known, as excluding from the term "others as yet unknown" any "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities." Id., at 196. Since the Government in this case had not shown that further investigation

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of Irving Kahn's activities would not have implicated Minnie in the gambling business, the Court of Appeals felt that Mrs. Kahn was not a "person as yet unknown" within the purview of Judge Campbell's order.

[1] We granted the Government's petition for certiorari, 411 U.S. 980, 36 L.Ed.2d 956, 93 S. Ct. 2275, in order to resolve a seemingly important issue involving the construction of this relatively new federal statute.[7]

[2] At the outset, it is worth noting what issues are not involved in this case. First, we are not presented with an attack upon the constitutionality of any part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Secondly, review of this interlocutory order does not involve any questions as to the propriety of the Justice Department's internal procedures in authorizing

7. The Kahns' cross-petition for certiorari, raising the marital privilege argument, was denied. 411 U.S. 986, 36 L.Ed.2d 964, 93 S.Ct. 2271.

the application for the wiretap.[8] Finally, no argument is presented that the federal agents failed to conduct the wiretap here in such a manner as to minimize the interception of innocent conversations.[9] The question presented is simply whether the conversations that the Government wishes to introduce into evidence at the respondents' trial are made inadmissible by the "others as yet unknown" language of Judge Campbell's order or by the corresponding statutory requirements of Title III.

[415 U.S. 151]

In deciding that Minnie Kahn was not a person "as yet unknown" within the meaning of the wiretap order, the Court of Appeals relied heavily on an expressed objective of Congress in the enactment of Title III: the protection of the personal privacy of those engaging in wire communications.[10] In light of this clear congressional concern, the Court of Appeals reasoned, the Government could not lightly claim that a person whose conversations were intercepted was "unknown" within the meaning of Title III. Thus, it was not enough that Mrs. Kahn was not known to be taking part in any illegal gambling business at the time that the Government applied for the wiretap order; in addition, the court held that the Government was required to show that such complicity would not have been discovered had a thorough investigation of Mrs. Kahn been conducted before the wiretap application.

8. Such issues are currently sub judice in United States v. Giordano, No. 72-1057, and United States v. Chavez, No. 72-1319.

9. In relevant part, 18 U.S.C. § 2518(5) [18 U.S.C.S. § 2518(5)] requires that:

> "Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ."

10. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Tit. III, §§ 801(b) and (d), 82 Stat. 211; S. Rep. No. 1097, 90th Cong., 2d Sess., 66.

[3] In our view, neither the legislative history nor the specific language of Title III compels this conclusion. To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime.[11] There is, of course, some tension between these two stated congressional objectives, and the question of how Congress struck the balance in any particular instance cannot be resolved simply through general reference to the statute's expressed concern for the protection of individual privacy. Rather, the starting point, as in all stautory construction, is the precise wording chosen by Congress in enacting Title III.

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Section 2518(1) of Title 18, U.S.C. [U.S.C.S.], sets out in detail the requirements for the information to be included in an application for an order authorizing the interception of wire communications. The sole provision pertaining to the identification of persons whose communications are to be intercepted is contained in § 2518 (1)(b)(iv), which requires that the application state "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted." (Emphasis supplied.) This statutory language would plainly seem to require the naming of a specific person in the wiretap application only when law enforcement

11. See id., § 801(c), 82 Stat. 211; S. Rep. No. 1097, 90th Cong., 2d Sess., 66-76.

officials believe that such an individual is actually committing one of the offenses specified in 18 U.S.C. § 2516 [18 U.S.C.S. § 2516]. Since it is undisputed here that Minnie Kahn was not known to the Government to be engaging in gambling activities at the time the interception order was sought, the failure to include her name in the application would thus seem to comport with the literal language of § 2518(1)(b)(iv).

Moreover, there is no reason to conclude that the omission of Minnie Kahn's name from the actual wiretap order was in conflict with any of the provisions of Title III. Section 2518(4)(a) requires that the order specify "the identity of the person, if known, whose communications are to be intercepted." Since the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application, it can hardly be inferred that this statutory language imposes any broader requirement than the identification provisions of § 2518(1)(b)(iv).

[4] In effect, the Court of Appeals read these provisions of § 2518 as if they required that the application and order identify "all persons, known or discoverable, who are committing the offense and whose communications are to be intercepted." But that is simply not what

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the statute says: identification is required only of those "known" to be "committing the offense." Had Congress wished to engraft a separate requirement of "discoverability" onto the provisions of Title III, it surely would have done so in language plainer than that now embodied in § 2518.

[5] Moreover, the Court of Appeals' interpretation of § 2518 would have a broad impact. A requirement that the Government fully investigate the possibility that any likely user of a telephone was engaging in criminal activities before applying for an interception order would greatly subvert the effectiveness of the law enforcement mechanism that Congress constructed. In the case at hand, the Court of Appeals' holding would require the complete investigation, not only of Minnie Kahn, but also of the two teen-aged Kahn children and other frequenters of the Kahn residence before a wiretap order could be applied for. If the telephone were in a store or an office, the Government might well be required to investigate everyone who had access to it—in some cases, literally hundreds of people—even though there was no reason to suspect that any of them were violating any criminal law. It is thus open to considerable doubt that such a requirement would ultimately serve the interests of individual privacy. In any event, the statute, as actually drafted contains no intimation of such total investigative demands.[12]

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[5] 12. It is true, as the Court of Appeals noted, that 18 U.S.C. §§ 2518(1)(c) and 2518(3)(c) [18 U.S.C.S. §§ 2518(1)(c) and 2518(3)(c)] require the application to demonstrate, and the judge authorizing any wire interception to find, that "normal investigative procedures" have either failed or appear unlikely to succeed. This language, however, is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. See generally S. Rep. No. 1097, 90th Con., 2d Sess., 101. Once the necessity for the interception has been shown, §§ 2518(1)(c) and 2518(3)(c) do not impose an additional requirement that the Government investigate all persons who may be using the subject telephone in order to determine their possible complicity.

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[6, 7] In arriving at its reading of § 2518, the Court of Appeals seemed to believe that taking the statute at face value would result in a wiretap order amounting to a "virtual general warrant," since the law enforcement authorities would be authorized to intercept communications of anyone who talked on the named telephone line. 471 F.2d, at 197. But neither the statute nor the wiretap order in this case would allow the federal agents such total unfettered discretion. By its own terms, the wiretap order in this case conferred authority to intercept only communications "concerning the above-described [gambling] offenses."[13] Moreover, in accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations.[14] And the order limited the length of any possible interception to 15 days, while requiring status reports as to the progress of the wiretap to be submitted to the District Judge every five days, so that any possible abuses might be quickly discovered and halted. Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly

13. Title 18 U.S.C. § 2518(4)(c) [18 U.S.C.S. § 2518(4)(c)] requires that an order authorizing wire interceptions contain:

> "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates"

See also 18 U.S.C. § 2518(1)(b)(iii) [18 U.S.C.S. § 2518(1)(b)(iii)], imposing a similar requirement as to the application for a wiretap order.

But cf. 18 U.S.C. § 2517(5) [18 U.S.C.S. § 2517(5)], providing that under certain circumstances intercepted conversations involving crimes other than those identified in the order may be used in evidence.

14. See n. 9, supra.

left the executing agents free to seize at will every communication

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that came over the wire—and there is no indication that such abuses took place in this case.[15]

[8] We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

[7] 15. The fallacy in the Court of Appeals' "general warrant" approach may be illustrated by examination of an analogous conventional search and seizure. If a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for physical records of gambling operations, there could be no question that a subsequent seizure of such records bearing Minnie Kahn's handwriting would be fully lawful, despite the fact that she had not been identified in the warrant or independently investigated. In fact, as long as the property to be seized is described with sufficient specificity, even a warrant failing to name the owner of the premises at which a search is directed, while not the best practice, has been held to pass muster under the Fourth Amendment. See Hanger v. United States, 398 F.2d 91, 99 (C.A. 8); Miller v. Sigler, 353 F.2d 424, 428 (C.A. 8) (dictum); Dixon v. United States, 211 F.2d 547, 549 (C.A. 5); Carney v. United States, 79 F.2d 821, 822 (C.A. 6); United States v. Fitzmaurice, 45 F.2d 133, 135 (C.A. 2) (L. Hand, J.); Mascolo, Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy, 73 Dick. L. Rev. 1, 21. See also United States v. Fiorella, 468 F.2d 688, 691 (C.A. 2) ("The Fourth Amendment requires a warrant to describe only 'the place to be searched, and the persons or things to be seized,' not the persons from whom things will be seized").

[9] The remaining question is whether, under the actual language of Judge Campbell's order, only those intercepted conversations to which Irving Kahn himself was

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a

party are admissible in evidence at the Kahns' trial, as the Court of Appeals concluded. The effect of such an interpretation of the wiretap order in this case would be to exclude from evidence the intercepted conversations between Minnie Kahn and the "known gambling figure" concerning betting information. Again, we are unable to read either the District Court order or the underlying provisions of Title III as requiring such a result.

The order signed by Judge Campbell in this case authorized the Government to "intercept wire communications of Irving Kahn and others as yet unknown . . . to and from two telephones, subscribed to by Irving Kahn." The order does not refer to conversations *between* Irving Kahn and others; rather, it describes "communications *of* Irving Kahn and others as yet unknown" to and from the target telephones. To read this language as requiring that Irving Kahn be a party to every intercepted conversation would not only involve a substantial feat of verbal gymnastics, but would also render the phrase "and others as yet unknown" quite redundant, since Kahn perforce could not communicate except with others.

Moreover, the interpretation of the wiretap authorization adopted by the Court of Appeals is at odds with one of the stated purposes of Judge Campbell's order. The District Judge specifically found that the wiretap was needed to "reveal the identities of [Irving Kahn's] con-

federates, their places of operation, and the nature of the conspiracy involved." It is evident that such information might be revealed in conversations to which Irving Kahn was not a party. For example, a confederate might call in Kahn's absence, and leave either a name, a return telephone number, or an incriminating message. Or, one of Kahn's associates might himself

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come to the family home and employ the target telephones to conduct the gambling business.[16] It would be difficult under any circumstances to believe that a District Judge meant such intercepted conversations to be inadmissible at any future trial; given the specific language employed by Judge Campbell in the wiretap order today before us, such a conclusion is simply untenable.

[10] Nothing in Title III requires that, despite the order's language, it must be read to exclude Minnie Kahn's communications. As already noted, 18 U.S.C. §§ 2518 (1)(b)(iv) and 2518(4)(a) [18 U.S.C.S. §§ 2518(1)(b)(iv) and 2518(4)(a)] require identification of the person committing the offense only "if known." The clear implication of this language is that when there is probable cause to believe that a particular telephone is being used to commit an offense but no particular person is identifi-

16. By referring to the conversations of Kahn and others "to and from" the two telephones, the order clearly envisioned that the "others" might be either receiving or transmitting gambling information *from* the two Kahn telephones. Yet it could hardly be expected in these instances that Irving Kahn would always be the person on the other end of the line, especially since either bettors or Kahn's confederates in the gambling business might often have occasion to dial the telephone numbers in issue.

able, a wire interception order may, nevertheless, properly issue under the statute.[17] It necessarily follows that Congress could not have intended that the authority to intercept must be limited to those conversations *between* a party named in the order and others, since at least in some cases, the order might not name any specific party at all.[18]

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For these reasons, we hold that the Court of Appeals was in error when it interpreted the phrase "others as yet unknown" so as to exclude conversations involving Minnie Kahn from the purview of the wiretap order. We further hold that neither the language of Judge Campbell's order nor that of Title III requires the suppression of legally intercepted conversations to which Irving Kahn was not himself a party.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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17. Such a situation might obtain if a bettor revealed to law enforcement authorities that he had repeatedly called a certain telephone number in order to place wagers, but had never been told the name of the person at the other end of the line.

18. In fact, the Senate rejected an amendment to Title III that would have provided that only the conversations of those specifically named in the wiretap order could be admitted into evidence. 114 Cong. Rec. 14718 (1968) (Amendment 735).

SEPARATE OPINIONS

Mr. Justice Douglas, with whom Mr. Justice Brennan and Mr. Justice Marshall concur, dissenting.

As a result of our decision in Berger v. New York, 388 U.S. 41, 18 L.Ed.2d 1040, 87 S.Ct. 1873, a wiretap —long considered to be a special kind of a "search" and "seizure"—was brought under the reach of the Fourth Amendment.[1] The dominant feature of that Amendment was the command that "no Warrants shall issue, but upon probable cause"—a requirement which Congress wrote into 18 U.S.C. § 2518 [18 U.S.C.S. § 2518].[2]

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1. Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Title 18 U.S.C. § 2518 [18 U.S.C.S. § 2518] provides in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . . . .

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . . . .

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

. . . . .

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By § 2518(3), the judge issuing the warrant must be satisfied by the facts submitted by the police that there is "probable cause" for belief that "an individual" is committing the described offense, § 2518(3)(a); that there is "probable cause" for belief that particular communications concerning the offense will be attained by interception, § 2518(3)(b); that normal investigative procedures have been tried but have failed or reasonably appear to be unlikely to succeed or to be too dangerous, § 2518(3)(c), and that there is "probable cause" for belief that named facilities are being used or are about to be used in the commission of the named offense, § 2518(3)(d). The Act goes on to state that the judge must specify "the identity of the person, if known, whose communications are to be intercepted." § 2518(4)(a).

The judge in the present case described the telephones

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to be tapped and found probable cause to believe "Irving Kahn and others as yet unknown" were connected with the commission of specified interstate crimes. The judicial order authorized special federal agents to "intercept wire communications of Irving Kahn and others as yet unknown" concerning these crimes.

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

. . . . .

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted."

The agents intercepted incriminating calls made by Irving Kahn and also incriminating calls made by his wife, Minnie Kahn. The District Court on motions to suppress disallowed use of the conversations of Minnie Kahn; and the Court of Appeals agreed, saying that the probable-cause order made it necessary for the Government to meet two requirements: (1) "that Irving Kahn be a party to the conversations, and (2) that his conversations intercepted be with 'others as yet unknown,'" 471 F.2d 191, 195. That seems to be a commonsense interpretation, for Irving Kahn when using a phone talks not to himself but with "others" who at the time were "unknown." To construe the warrant as allowing a search of the conversations of anyone putting in calls on the Kahn telephone amounts, as the Court of Appeals said, "to a virtual general warrant in violation" of Mrs. Kahn's rights, id., at 197.

Whether the search would satisfy the Fourth Amendment is not before us, the decision below being based solely on the Act of Congress. Seizure of the words of Mrs. Kahn is not specified in the warrant. The narrow scope of the search that was authorized was limited to Mr. Kahn and those whom he called or who called him.

Congress in passing the present Act legislated, of course, in light of the general warrant. The general warrant historically included a license to search for everything in a named place as well as a license to search all and any places in the discretion of the officers.

Frisbie v. Butler, 1 Kirby 213 (Conn.);[3] Quincy's Mass. Rep. 1761-1772, App. I.

In light of the prejudice against general warrants which I believe Congress shared,[4] I would not allow Mrs.

3. The warrant in the Frisbie case read in relevant part:
"[Y]ou are commanded forthwith to search all suspected places and persons that the complainant thinks proper, to find his lost pork, and to cause the same, and the person with whom it shall be found, or suspected to have taken the same, and have him to appear before some proper authority, to be examined according to law." 1 Kirby 213-214.
The Court ruled:
"With regard to the warrant—Although it is the duty of a justice of the peace granting a search warrant (in doing which he acts judicially) to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect; and the arrest to such person or persons as the goods shall be found with: And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal"; id., at 215.

4. The explicit requirements of the wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. [18 U.S.C.S. §§ 2510 et seq.], and their legislative history manifest a congressional effort to prevent law enforcement agents from proceeding by way of general search warrants. Section 2518(4)(a), of course, requires that a wiretap authorization order identify the person, if known, whose communications are to be intercepted. Sections 2518(4) (b) and (c) require that the order also specify the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted, and also particularly describe the type of communication to be intercepted and the particular offense to which it relates. Congress also provided that no order "may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization." 18 U.S.C. § 2518(5) [18 U.S.C.S. § 2518(5)]. An authorization order, moreover, must specify that the electronic surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." Ibid.

Kahn's conversations to be impliedly covered by the warrant, for to do so allows a search of the entire list of outgoing and incoming calls to the Kahn telephones, even though no showing of probable cause had been made concerning any member of the household other than Mr. Kahn.

I cannot believe that Congress sanctioned that practice.

In the first place, though the agents just heard Mrs. Kahn using the phone on March 21 and though they continued their surveillance until March 25, they took no steps to broaden the warrant to include Mrs. Kahn.[5]

Before a wiretap order can issue, Title III also demands that law enforcement officers applying for the order provide the judge with information describing the offense, the facility, the type of communication, and the identity of the person, if known, committing the offense and whose communications are to be intercepted, 18 U.S.C. § 2518(1)(b) [18 U.S.C.S. § 2518(1)(b)], because in the view of Congress "[e]ach of these requirements reflects the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101. Furthermore, § 2518(3) requires the judge, before issuing a wiretap order, to find that there is probable cause to believe that an individual is involved with a particular offense, that particular communications concerning that offense will be intercepted, and that specific facilities are being used or about to be used in connection with the commission of such offense, or are leased to, listed to, or commonly used by the individual. Congress inserted these provisions because it felt that, with them, "the order will link up specific person, specific offense, and specific place. Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." Id., at 102.
See also S. Rep. No. 1097, 90th Cong., 2d Sess., 74-75; 114 Cong. Rec. 14712, 14750 (remarks of Sen. McClellan); id., at 14728 (Sen. Tydings); id., at 14715 (Sen. Tower); id., at 14753 (Sen. Percy); id., at 14748 (Sen. Mundt).

5. If the statement made by Mrs. Kahn on the telephone March 21 was incriminating, there would be a question whether it could be the basis for obtaining a broadening of the warrant to include her

There was time[6] to obtain a warrant concerning Mrs. Kahn. I assume that one could have been obtained between March 21 and March 25. Then a judge would have decided the particularity of the search of the Kahn household.

Under today's decision a wiretap warrant apparently need specify but one name and a national dragnet becomes operative. Members of the family of the suspect, visitors in his home, doctors, ministers, merchants, teachers, attorneys, and everyone having any possible connection with the Kahn household are caught up in this web.

I would affirm the judgment below.

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without violating Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182, 24 A.L.R. 1426. In that case papers had been seized by officers in violation of the parties' Fourth Amendment rights but used by the officials as a basis for demanding in proper form that the owners produce the papers. Mr. Justice Holmes, speaking for the Court, rejected that procedure, saying:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." Id., at 392, 64 L.Ed. 319.

6. Cf. Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367; United States v. Di Re, 332 U.S. 581, 92 L.Ed. 210, 68 S.Ct. 222; Trupiano v. United States, 334 U.S. 699, 92 L.Ed. 1663, 68 S.Ct. 1229.

UNITED STATES OF AMERICA,
Appellant,

v.

THOMAS W. DONOVAN et al.,
Appellees.

No. 74-1553

United States Court of Appeals,
Sixth Circuit.

March 17, 1975

As Amended May 5, 1975

After the United States District Court for the Northern District of Ohio, Robert B. Krupansky, J., suppressed wiretap evidence in a gambling prosecution on the ground that government agents failed to comply with two statutory requirements, the government appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that suppression of the evidence was proper where the government failed to include the name of one suspect in its applications for wiretap authorizations even though that suspect was "known" to the government, and where it further failed to serve inventory notices on two other suspects who were identified as parties to the communications.

Affirmed.

Engel, Circuit Judge, concurred in part and dissented in part and filed opinion.

* * *

PHILLIPS, Chief Judge.

This case involves the admissibility of evidence obtained through court-authorized telephone wiretaps. District Judge Robert B. Krupansky suppressed evidence against the five named defendants-appellees on the ground that Government agents failed to comply with two statutory requirements. The Government appeals.

Essentially the basic question on this appeal is whether Congress meant what it said when it enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, permitting court-authorized interception of telephone conversations under carefully prescribed restrictions.

In United States v. Chavez, 416 U.S. 562, 574-75, 94 S.Ct. 1849, 1856, 40 L.Ed.2d 380 (1974), the Supreme Court said:

> "[W]e did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful' . . . suppression is not mandated for every violation of Title III, but only if 'disclosure' of the contents of the intercepted communications, or derivative evidence, would be in violation of Title III."

We hold that the District Court correctly found that disclosure in the present case was a violation of Title III. We reject the Government's contention that non-compliance with the requirements of this statute can be condoned or excused on the theory that it was "inadvertent" and "unintentional" or constituted "mere technical violations."

I.

The first breach of the statute involves 18 U.S.C. § 2518 (1)(b)(iv), which requires that each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction which shall include, among other specified information, "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

The District Court held that the defendants Donovan, Robbins and Buzzacco were "known" to the Government within the meaning of the statute and that failure to include their names in the applications and orders contravenes the statute and necessitates the suppression of the contents of intercepted communications and the evidence derived therefrom as to these three defendants.

The second breach of the statute involves a failure to comply with the inventory requirements of 18 U.S.C. § 2518(8)(d), which provides that:

> "(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized, approved or disapproved interception,

or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

The District Court held that the defendants Merlo and Lauer were not served with notices of inventory and that in the interest of justice their communications must be suppressed.

These five defendants-appellees[1] were among seventeen persons indicted for their participation in an illegal gambling business. The two count indictment charged conspiracy and substantive violations of 18 U.S.C. §§ 371 and 1955. A large part of the evidence which supported these indictments was gathered pursuant to an order authorizing the interception of wire communications issued by the District Court on November 28, 1972. This order was granted upon application of the Organized Crime and Racketeering Section of the Department of Justice and after consideration of a forty-six page affidavit submitted by a special agent of the Federal Bureau of Investigation. The affidavit indicated that reliable informants had named certain persons engaged in illegal gambling activities and that this information was corroborated by physical surveillance and telephone company records.

1. On January 18, 1974, the District Court ordered these five defendants severed from the remaining twelve for purposes of trial.

The order, which was issued by Chief District Judge Frank J. Battisti, authorized special agents of the FBI:

> "To intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George F. Florea, Suzanne Veres and others, as yet unknown concerning the above described offenses to and from the telephones [described in the order]."

This order terminated on December 12, 1972.

On December 26, 1972, an extension of the November 28 order was sought and approved. This new order dropped two of the four previously approved intercepts. In addition, an order authorizing intercepts for another telephone number was sought and approved. These orders terminated on January 5, 1973.

On February 21, 1973, the court ordered the service of inventory notice upon 37 individuals known to have been parties to the intercepted conversations, as required by 18 U.S.C. § 2518(8)(d). The Government subsequently checked its records and discovered that two additional parties should have been given notice. On September 11, 1973, an amended order was filed which served inventory notice on the two additional parties. Neither submission to the District Judge named defendants Merlo and Lauer, although they were known to the Government as participants in the gambling activity whose communications had been intercepted.

II.

Congress has provided a statutory basis for suppression of wiretap evidence. 18 U.S.C. § 2515 prohibits the intro-

duction of wiretap evidence or its fruits "if the disclosure of that information would be in violation of this chapter." The specific grounds for suppression are spelled out in 18 U.S.C. § 2518(10)(a); an aggrieved person may move to suppress when:

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval."

In affirming an order to suppress pursuant to these provisions of the statute in United States v. Giordano, 416 U.S. 505, 527, 94 S.Ct. 1820, 1832, 40 L.Ed.2d 341 (1974), the Supreme Court said:

> "[W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

In United States v. Chavez, *supra,* 416 U.S. at 580, 94 S.Ct. at 1858, the Supreme Court held that Title III did not mandate suppression under the circumstances of that case, but said:

> "Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought."

III.

Title III requires that when the Government applies for a wiretap authorization, the "identity of the person, if known, committing the offense and whose communications are to be intercepted" must be disclosed specifically. 18 U.S.C. § 2518(1)(b)(iv).

There can be no doubt on the record before us that Donovan and Robbins were "known." The Government contends that Buzzacco was not "known," but, for the reasons hereinafter set forth, we agree with the District Court that the name of Buzzacco, along with the names of Donovan and Robbins, should have been disclosed to the District Judge.

Our concern in this case is whether an intercept of a conversation with three persons, known to be committing the crime for which the intercept is authorized, yet unnamed in the wiretap application and order is "unlawfully intercepted" within the meaning of 18 U.S.C. § 2518(10)(a)(i).

Title III seeks to strike a balance between the mixed advantages and dangers of electronic surveillance. Those same features which make wiretaps so valuable as a weapon against the operations of organized crime also pose a substantial threat to individual privacy. To resolve the "tension between these two stated congressional objectives, . . . the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III." United States v. Kahn, 415 U.S. 143, 151, 94 S.Ct. 977, 982, 39 L.Ed.2d 225 (1974).

The literal language of the identification requirement leaves no question as to when the Government must specifically name the parties. Section 2518 requires that "each application *shall* include . . . the identity of the person, if known, committing the offense, and whose communications are to be intercepted." (Emphasis added.) This requirement is only one of the many specific steps that the Government must follow in order to obtain wiretap authorization, and is a procedural restraint on the use of wiretaps. In our opinion this is not a hollow requirement. It is an important part of the statutory framework that Congress formulated for protection against the dangers of electronic surveillance.

In United States v. Bellosi, 501 F.2d 833, 837 (D.C. Cir. 1974), the court said:

> "By asking us to refashion another clearly worded provision in Title III in a way that would somewhat ease another of the 'stringent conditions' with which a law enforcement agency must comply before conducting an interception, the Government effectively asks us to do what the *Giordano* Court would not. Section 2518(1) is no less important than Section 2516(1) to Congress' legislative scheme to allow only limited governmental interception of wire or oral communications. Section 2518(1) provides that the judge from whom interception authorization is sought be provided with a detailed and particularized application containing that information which Congress thought necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs. *See* United States v. United States District Court, 407 U.S. 297, 302, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)."

By requiring the Government to make this disclosure Congress has made it possible for the courts to exercise strict control over communication intercepts. It is apparent that Congress intended § 2518(1) to impose "stringent conditions," thereby playing an integral role in the limitation of wiretap procedures and serving a substantial purpose in the statutory scheme to limit the indiscriminate or otherwise unauthorized use of wiretaps.

When this same provision was construed in *Kahn* the Court stated that "[t]his statutory language would plainly seem to *require* the naming of a specific person in the wiretap application" when the person is known to be committing the offense. 415 U.S. at 152, 94 S.Ct. at 982. (Emphasis added.) Although the Court did not require suppression in that case it was only because Mrs. Kahn was not "known" within the meaning of the provision. There is the clear implication that if she had been "known" suppression would have been required. Later that year, in United States v. Giordano, *supra,* the Court construed § 2516(1) of Title III, requiring the Attorney General or a specially designated Assistant Attorney General to authorize the wiretap application. In that case suppression was also required because the mandatory precondition "was intended to play a central role in the statutory scheme." 416 U.S. at 528, 94 S.Ct. at 1832. Although the identity provision in the present case plays a different role in that statutory scheme than the provision in *Giordano,* we are of the opinion that it also plays "a central role."

[1] Since Congress has imposed a clear requirement that the identity of the participants must be disclosed "if known," we are not concerned with the reason that these names were omitted from the application. In our view it makes no difference whether the omission was inad-

vertent or purposeful. The fact of omission is sufficient to invoke suppression. This omission of Government agents cannot be excused as "a mere technical violation."

[2] We now come to the Government's contention that defendant Buzzacco was not "known" within the meaning of the statute.

The meaning of the term "if known" in 18 U.S.C. § 2518(1)(b)(iv) has been defined by the Supreme Court. In *Kahn, supra,* the Court concluded:

> "[T]hat Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought." 415 U.S. at 155, 94 S.Ct. at 984.

See United States v. Martinez, 498 F.2d 464, 466-67 (6th Cir. 1974).

The District Court found:

> "Special Agent, Ault, through a check of Ohio Bell Telephone Company records and execution of physical surveillances, became aware of defendant Buzzacco's identity and address in Niles, Ohio, subsequent to the first set of authorized wire interceptions. Agent Ault further testified that he was aware of Buzzacco's activity and believed he was involved in gambling activities prior to submission of the Affidavit on December 26, 1972."

The following factual background was developed to support these findings. During a ten week period in June and July 1972 ninety-one telephone calls placed by prime suspects in the case were traced to a Youngstown, Ohio,

telephone number which was known to be listed under one of Buzzacco's aliases. The FBI knew from previous investigations that Buzzacco had a reputation for being a bookmaker. In the summer or fall of 1972 Buzzacco moved his place of operation to Niles, Ohio. The record is inconclusive as to the date that physical surveillance placed Buzzacco at the Niles address, although it may have been as late as December 29, 1972. Prior to that time physical surveillance of that address had been conducted. In addition, telephone calls placing lay-off bets were intercepted between the other suspects and a person at the Niles number variously identified as "Buzz" or "Buzzer." At the hearing on the motion to suppress, FBI Agent Ault, upon whose affidavits the wiretap orders were based, testified that he had "suspicions" that Buzzacco was involved in the gambling activities prior to the submission of the wiretap applications.

Our prior decisions clearly illustrate that these facts are adequate to demonstrate "a probability of criminal conduct." Coury v. United States, 426 F.2d 1354, 1356 (6th Cir. 1970). In *Coury* we affirmed a commissioner's finding of probable cause on the strength of an affidavit which stated that the investigating special agent:

> "had personally conducted an investigation of appellant, including surveillance of his home; that he knew appellant to be a bookmaker and a gambler, and knew of his prior conviction for bookmaking activities; also that telephone company records listed calls between appellant and known gamblers in other states. In addition, the Bishop affidavit cited telephone company records showing calls from another well-known gambler to appellant's home." 426 F.2d at 1356.

See also United States v. Williams, 459 F.2d 909 (6th Cir. 1972).

We, therefore, hold that at the time the applications for wiretaps were made the Government had probable cause to believe that Buzzacco was engaged in the illegal gambling activities for which the intercept authorization was sought. He, therefore, should have been named in the application.

We, accordingly, affirm the order of the District Court granting the motions to suppress filed by Donovan, Robbins and Buzzacco.

IV.

Although the defendants Merlo and Lauer were not named in the wiretap application, during the course of the intercepts they were identified as parties to the communications. On February 21, 1973, the District Court ordered the service of inventory notice on 37 persons. After the Government checked its records it was found that two persons had been omitted from the original order. On September 11, 1973, when the District Court was informed of this omission, an amended order directing service of inventory notice was granted as to these two additional parties. Merlo and Lauer's names were never brought to the attention of the court, prior to the first or second order, or at any time thereafter. Consequently they have never been served with inventory notice.

The inventory notice provisions of Title III are set out in 18 U.S.C. § 2518(8)(d) and are quoted above. Since the inventory notice provision does not require on its face that notice must be served in all instances, the case presented by Merlo and Lauer involves a slightly different

situation than the identification "if known" provision of Title III discussed previously. If the overheard parties have not been named in the order, as in the present case, "the judge may determine *in his discretion*" that inventory notice should be served "in the interest of justice." 18 U.S.C. § 2518(8)(d). (Emphasis added.) The judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion.

[3] We agree with the following holding in United States v. Chun, 503 F.2d 533, 540 (9th Cir. 1974):

> "[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his § 2518(8)(d) discretion, we also hold that the government is required to furnish such information as is available to it. It is our belief that this allocation of responsibilities between the executive and judicial branches of government will best serve the dual purposes underlying Title III." (Footnote omitted.)

Both Merlo and Lauer were overheard in the authorized interceptions and both subsequently were indicted.[2] The evidence in the intercepts was to be used against them. Even though the Government re-examined the records and amended the original inventory notice, Merlo and Lauer never received formal inventory notice. The District Court

made a specific finding that "defendants Merlo and Lauer were not served with inventories pursuant to the act *or otherwise notified that they had been intercepted*. . . ." (Emphasis added.)

This finding demonstrates to our satisfaction that the District Court has considered and decided the issue of actual notice. We draw no inference from the fact that notice was given to 39 other persons, many of whom were known to Merlo and Lauer. Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted.

[4] The only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions. The Government explains this omission on the basis of "an apparent lack of communication between the FBI and the prosecutor" although the defendants urge that "the government deliberately flouted and denigrated the provisions of Title III by secreting" the defendants' names. For the purpose of this analysis it is unnecessary to determine which view is correct. Either the Government's deliberate circumvention, *see* United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972), or an inadvertent error may require suppression. Although certain cases decided prior to *Giordano* and *Chavez* indicate that, in the absence of actual notice, the prejudice to the defendants is a factor to be considered, *see* United States v. Cirillo, 499 F.2d 872, 882-83 (2d Cir. 1974); United States v. Wolk, 466 F.2d 1143, 1146 (8th Cir. 1972), *Giordano* states that if the provision plays a "central role" that "suppression must follow when it is shown that this statutory requirement has been ignored." 416 U.S. at 529, 94 S.Ct. at 1832.[3]

2. This case does not present, and we do not reach, the question of the rights of unindicted persons to receive inventory notice. *See* United States v. Whitaker, 474 F.2d 1246 (3d Cir.), cert. denied, 412 U.S. 953, 93 S.Ct. 3003, 37 L.Ed.2d 1006 (1973).

Of the recent cases decided by the Supreme Court on the requirements of Title III the present case is most factually similar to *Giordano*. In *Giordano,* as in this case, there was no actual compliance with the statute. The unauthorized approval of wiretap orders, like the failure to serve inventory notice, are both factors which are not susceptible of a showing of prejudice. The factor which distinguishes this case from *Chavez* is that in *Chavez* the statute was in fact followed even though the wiretap orders appeared facially defective. There is no suggestion in the present case that the Government fulfilled its duty under the statute or that there was even a colorable conformity with the statutory requirements. Further, this is not a case where a strict interpretation of the statute would render the statute essentially useless for law enforcement purposes as in United States v. Kahn, 415 U.S. 143, 153 94 S.Ct. 977, 39 L.Ed.2d 225 (1974).

From our examination of the legislative history of this provision, *see* United States v. Chun, *supra,* 503 F.2d at 537 n.6, 539-40, 542 n.12, it is our conclusion that this

3. For a general discussion of 18 U.S.C. §§ 2516 and 2518, *see* United States v. Wac, 498 F.2d 1227, 1230-32 (6th Cir. 1974).

provision plays a central role in the statutory scheme to limit and control electronic surveillance and that it "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." United States v. Giordano, *supra,* 416 U.S. at 527, 94 S.Ct. at 1832.

Suppression is required if there is a breach of a Title III provision that "directly and substantially implements" the congressional scheme to limit the use of electronic surveillance. We have determined previously that the Government had a duty to disclose the identity of Merlo and Lauer, and that this duty was breached. It is our view that the inventory notice provisions have a central role in limiting the use of intercept procedures. For these reasons we agree with the District Court that the communications of Merlo and Lauer were "unlawfully intercepted," 18 U.S.C. § 2518(10)(a)(i), and that suppression is required.

The decision of the District Court is affirmed.

ENGEL, Circuit Judge (concurring in part and dissenting in part).

While I agree that the district court properly suppressed the wiretap evidence as to defendants Donovan, Robbins and Buzzacco for the reasons stated in the majority opinion, I respectfully dissent from so much thereof as affirms the suppression of the wiretap evidence against defendants Merlo and Lauer because of violation of 18 U.S.C. § 2518 (8)(d). I would reverse and remand for reconsideration in the light of United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974); United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380

(1974) and certain guidelines which I believe this court should establish in the interpretation of the inventory notice provisions of the statute.

The Factual Background

Merlo and Lauer were not named in the wiretap applications, and their identity was not known at the time application for the interception was made on November 28, 1972, or when a continuation was approved on December 26, 1972. According to the testimony of Special Attorney Edwin J. Gale, twelve telephone conversations placed from the apartment under surveillance and received by Merlo and Lauer were intercepted between December 9, 1972 and January 3, 1973. On January 13, 1973, pursuant to a search warrant, a search was conducted by the FBI of the premises at 21 Olive Street, Akron, Ohio in the presence of both defendants. Evidence was seized as a result of the search and inventories thereof were filed and served, at least upon Merlo. Statements made by Merlo and Lauer at that time indicated that they had answered telephones located in the Olive Street apartment and that Merlo had employed Lauer as a phone man.

The defendants assert in their brief that "the contents of these intercepted communications (phone calls from the telephones under surveillance to Merlo and Lauer) were submitted by the government as probable cause for a search of the defendant's apartment on January 13, 1973." This assertion by defendants is not supported by the record, is denied by the government, and is not a fact found by the trial court. On the contrary, while the activities of Merlo and Lauer were unquestionably known to federal authorities from some time prior to January 13, 1973, the only evidence on the record indicating the date

when the conclusion was reached that it was Merlo and Lauer who were parties to the twelve interceptions comes from the testimony of Special Attorney Gale, who placed the time as "late summer of 1973. Perhaps late August."

No inventory notice was ever served on either defendant. A sealed indictment naming both Merlo and Lauer as defendants was filed on November 1, 1973 and was unsealed November 6. On December 17, 1973 transcripts of the twelve interceptions were furnished by the government in response to a request by defendants. On January 17, 1973 District Judge Robert Krupansky suppressed the evidence, and on the following day entered an order severing the trials of Merlo, Lauer and the other appellees herein from that of the remainder of the defendants, thus paving the way for this interlocutory appeal upon certification by the government pursuant to 18 U.S.C. § 3731.

Suppression Under the Statute

The appeal from the district court's suppression of the wiretap evidence presents the issue of whether failure to serve upon those defendants post-interception inventory notice violates the provisions of 18 U.S.C. § 2518(8)(d), and if so, whether the violation requires suppression under 18 U.S.C. § 2518(10)(a). In the words of United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974), ". . . the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III." 415 U.S. at 151, 94 S.Ct. at 982.

Subsection (8)(d) of Section 2518 provides that the issuing judge "shall cause to be served, on the persons named in the order or the application, and such other

parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory . . . ." Under the statute, therefore, it was within the discretion of the judge to cause an inventory to be served upon Merlo and Lauer as "such other parties to intercepted communications." Since the judge will have no independent information and must depend upon the government to disclose the names of such other persons, I agree with the majority that the government, therefore, should have a duty on its own initiative to disclose to the judge the names of such persons known to it, even though such duty is not spelled out in the statute. See United States v. Chun, 503 F.2d 533, 540 (9th Cir. 1974). I depart from the majority, however, when it holds in effect that a violation of the judicially created duty calls for suppression without regard to whether it was the result of a deliberate flouting of the statute, United States v. Eastman, 465 F.2d 1057 (3rd Cir. 1972) or an inadvertent error, United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972), or whether there was actual prejudice to the defendants by reason thereof. Such a construction of the statute, in my view, goes well beyond United States v. Chun, *supra*, runs counter to standards for suppression set forth in *Giordano* and *Chavez*, and is similar to the everly restrictive approach to statutory interpretation which was rejected in United States v. Kahn, *supra*.

Chavez and *Giordano* set out the standards for suppression under 18 U.S.C. § 2518(10)(a)(i). As noted by the court in *Chavez, Giordano* "did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful'." *Chavez, supra*, 416 U.S. at 574, 575, 94 S.Ct. at 1856. Rather, the court

in *Giordano* noted: ". . . Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to *limit the use* of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." (emphasis added) *Giordano, supra,* 416 U.S. at 527, 94 S.Ct. at 1832.

In considering whether we should apply the suppression provisions of 18 U.S.C. § 2518(10)(a)(i) to violations of the post-interception inventory notice provisions of 18 U.S.C. § 2518(8)(d), it is necessary to recognize that since the interception has already occurred, the service of inventory afterward has little, if anything to do with deterring improper initial resort to the procedure. The language "'unlawfully intercepted' must be 'stretched'" to include failures of conditions subsequent to a valid authorization and execution, *Chun, supra,* 503 F.2d at 542, n. 18. It is, therefore, difficult enough for me to conclude that the inventory notice provisions were intended to play a "central role" in "limiting the use of intercept procedures" where the statute specifically requires notice; it is even more difficult where notice is made discretionary and the alleged violation is not even mentioned in the statute. Nevertheless, a judicial interpretation of the statute which imposes a duty on the government to disclose to the judge the names of persons later identified as parties to intercepted communications is reasonable, consistent with the needs of the judge if he is to exercise his statutory discretion and in keeping with the spirit and intent of the Act. 1968 U.S. Code Cong. & Admin. News, p. 2184. See also Commentary to Standard No. 5.15, tentative draft of American Bar Association

Minimum Standards for Criminal Justice for Electronic Surveillances, proposed June 1968, at pages 161-162.

I agree that if the duty created is to have any meaning, it is reasonable to attach consequences to its violation which discourage abuse and protect against resulting injury. I do not agree that the language of the statute compels suppression as the invariable judicial vehicle of enforcement. I would limit suppression to those instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies such as compelling later disclosure or by permitting, in the words of *Chun,* "a reasonable opportunity to prepare an adequate response to the evidence which has been deprived from the interception." *Chun, supra,* 503 F.2d at 538.

The facts in this case, and indeed in most reported cases involving widespread organized crime, readily illustrate the complexity of investigations which frequently involve not only different investigative agencies of the federal government, but state law enforcement agencies as well. See e. g., United States v. Cirillo, 499 F.2d 872 (2nd Cir. 1974), cert. denied ____U.S.____, 95 S.Ct. 638, 42 L.Ed.2d 653. The knowledge of one law enforcement officer, or of even a single agency, can rarely be expected to encompass the knowledge of the whole. The identification of parties to telephone conversations by voice is difficult at best. It is infinitely more difficult when the parties are guarded in their remarks, or refer to one another by code name or nickname. Unless the Constitution or the express language of the statute commands otherwise, I believe we are obliged to construe the governmental duty consistently with the dual objectives of the Act:

> "To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime." (Footnote omitted) United States v. Kahn, *supra,* 415 U.S. at 151, 94 S.Ct. at 982.

If the foregoing guidelines are applied here, the decision of the district court cannot stand upon the record made and upon the limited findings of the district court.

There is nothing in the record here to suggest that the failure to notify the issuing judge of the names of Merlo and Lauer was anything but inadvertent. Notice was given not only to 37 persons by court order of February 21, 1973, but to two additional persons on September 11, 1973. This itself is a strong indication that the government was not indifferent to its obligations to make later disclosure. No tactical advantage to the government is even suggested in view of the widespread disclosure to others allegedly involved in the conspiracy.

Likewise, I view any possibility of actual prejudice highly doubtful upon the record here. "The majority concludes, erroneously I think, that 'This finding demonstrates to our satisfaction that the District Court has considered and decided the issue of actual notice' ". Actually the record shows only that the inventory notice was never sent them, and the district court finding is limited to the observation of "the government's admission that defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they have been intercepted". I do not conclude from this finding, however, that the district judge found, or the facts revealed, that the defendants had no prior actual knowledge

whatever of the interceptions. Thirty-nine of the alleged participants had already been formally notified. Because of the January search of their apartment, Merlo and Lauer already knew in the most concrete terms that their activities, and in particular telephone activities, were under FBI scrutiny. They may not have had direct or indirect notice from the government, but it challenges credulity to conclude therefrom that they did not have some actual knowledge of the interceptions.

The duty to notify Merlo and Lauer arose in late August when, according to Gale, their identity was first known. They were then, in the discretion of the judge, entitled to an inventory, including notice of the facts and dates described in 18 U.S.C. § 2518(8)(d)(1), (2) and (3). This information does not, however, necessarily include either transcripts of the tapes themselves or even the dates or particulars of individual conversations. As indicated earlier, indictment followed about two months later, and full disclosure of the transcripts themselves some six weeks after that. Further, the defendants were still entitled to protection of the ten-day rule of § 2518 (9). Since this appeal is itself interlocutory, they cannot claim that they have been put to trial without "reasonable opportunity to prepare an adequate response". *Chun, supra,* 503 F.2d at 538. They are, therefore, in a far more advantageous position than was defendant Venuetucci in United States v. Cirillo, *supra.* There Venuetucci did not actually learn of the interceptions of tapes involving his own conversations until the day they were introduced at his trial. The interceptions had been procured under the New York wiretap law which had been enacted following Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Nevertheless, the Second Circuit,

while agreeing that the government should have produced the tapes earlier, found their admission not to be reversible error where failure to make earlier disclosure was the result of oversight, no continuance was sought, and the defendant's claims of actual prejudice bordered on the frivolous. United States v. Cirillo, *supra,* 499 F.2d at 882-883.

Conclusion

This area of law is both novel and difficult and neither the trial court nor counsel have been furnished with much appellate guidance in working out the very real problems which arise under the statute. For that reason, I would vacate the order suppressing the wiretap evidence relating to Merlo and Lauer, and remand to the district court for reconsideration in the light of the foregoing observations, leaving it to the district judge to determine whether, in connection therewith, any further evidentiary hearing may also be required.

UNITED STATES v. CHAVEZ

416 U.S. 562, 40 L.Ed.2d 380, 94 S. Ct. 1849

OPINION OF THE COURT

[416 U.S. 564]

Mr. Justice White delivered the opinion of the Court.

[1] This case, like United States v. Giordano, 416 U.S. p. 505 40 L.Ed.2d 341, 94 S. Ct. 1820, concerns the validity of procedures followed by the Justice Department in obtaining judicial approval to intercept wire communications under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§ 2510-2520 [18 U.S.C.S. §§ 2510-2520], and the propriety of suppressing evidence gathered from court-authorized wiretaps where the statutory application procedures have not been fully satisfied. As is more fully described in Giordano, Title III limits who, among federal officials, may approve submission of a wiretap application to the appropriate District Court, to the Attorney General, or an Assistant Attorney General he specially designates, 18 U.S.C. § 2516(1) [18 U.S.C.S. § 2516(1)], and delineates the information each application must contain, upon what findings an interception order may be granted, and what the order shall specify, 18 U.S.C. §§ 2518(1), (3), (4) [18 U.S.C.S. § 2518(1), (3), (4)].[1] Within this general framework, two statutory requirements are of particular relevance to this case. Section 2518(1)(a) provides that each application for a court order authorizing or approving the interception of a wire or oral communication shall include, among other infor-

1. The relevant statutory provisions are set forth in the Appendix to United States v. Giordano, supra, p. 505, 40 L.Ed.2d 341.

mation, "the identity of the . . . officer authorizing the application." Similarly, § 2518 (4) (d) provides that the order of authorization or approval itself shall specify, in part, "the identity of . . . the person authorizing the application."

[416 U.S. 565]

The specific question for adjudication here, which it was unnecessary to resolve in Giordano, is whether, when the Attorney General has in fact authorized the application to be made, but the application and the court order incorrectly identify an Assistant Attorney General as the authorizing official, evidence obtained under the order must be suppressed. We hold that Title III does not mandate suppression under these circumstances.

I

Respondents were all indicted for conspiracy to import and distribute heroin in violation of 21 U.S.C. §§ 173, 174 [21 U.S.C.S. §§ 173, 174] (1964 ed). In addition, respondent Umberto Chavez was separately charged under 18 U.S.C. § 1952 [18 U.S.C.S. § 1952] with using and causing others to use a telephone between California and Mexico, and performing other acts, in order to facilitate unlawful narcotics activity, and respondent James Fernandez was charged under § 1952 with traveling between California and Mexico, and performing other acts, for the same purpose. Upon notification that the Government intended to introduce evidence obtained from wiretaps of Chavez' and Fernandez' phones at trial, respondents filed motions to suppress, challenging the legality of the Justice Department's application procedures leading to the issuance by the District Court of the two orders

permitting the wire interceptions. Affidavits filed in opposition by the former Attorney General and his Executive Assistant represented that the application submitted for the February 18, 1971, order authorizing interception of wire communications to and from the Chavez phone had been personally approved by the Attorney General, whereas the application for the February 25, 1971, order to intercept communications to and from the Fernandez phone had been approved by his Executive Assistant at a time when the Attorney General

[416 U.S. 566]

was unavailable, and pursuant to an understanding that the Executive Assistant, applying the Attorney General's standards as he understood them, could act for the Attorney General in such circumstances.

Each application to the court had recited, however, that the Attorney General, pursuant to 18 U.S.C. § 2516 [18 U.S.C.S. § 2516], had "specially designated" the Assistant Attorney General for the Criminal Division, Will Wilson, "to authorize [the applicant attorney] to make this application for an Order authorizing the interception of wire communications." Moreover, appended to each application was a form letter, addressed to the attorney making the application and purportedly signed by Will Wilson, stating that the signer had reviewed the attorney's request for authorization to apply for a wiretap order pursuant to 18 U.S.C. § 2518 [18 U.S.C.S. § 2518] and had made the requisite probable-cause and other statutory determinations from the "facts and circumstances detailed" in the request, and that "you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General . . . , pursuant to the power conferred on him by Section 2516 . . . to make

application" for a wire interception order. Correspondingly, the District Court's intercept order in each case declared that court approval was given "pursuant to the application authorized by . . . Will Wilson, who has been specially designated in this proceeding by the Attorney General . . . John N. Mitchell, to exercise the powers conferred on the Attorney General" by § 2516.

The discrepancy between who had actually authorized the respective applications to be made, and the information transmitted to the District Court clearly indicating that Assistant Attorney General Wilson was the authorizing official, was explained as the result of a standard procedure followed within the Justice Department.

[416 U.S. 567]

While the Attorney General had apparently refrained from designating any Assistant Attorney General to exercise the authorization power under § 2516(1), form memoranda were routinely sent from his office, over his initials, to Assistant Attorney General Wilson, stating that "with regard to your recommendation that authorization be given" to make application for a court order permitting wire interception, "you are hereby specially designated" to exercise the power conferred on the Attorney General by § 2516 "for the purpose of authorizing" the applicant attorney to apply for a wiretap order. Evidently, this form was intended to reflect notice of approval by the Attorney General, though on its face it suggested that the decision whether to authorize the particular wiretap application would be made by Assistant Attorney General Wilson. In fact, as revealed by the affidavits of Wilson's then Deputy Assistants filed in opposition to respondents' suppression motions, "Wilson did not examine the files or expressly

authorize the applications" for either the February 18 or February 25 interception orders, and they signed his name "in accordance with [his] authorization . . . and the standard procedures of the Criminal Division" to the respective letters of authorization to the applicant attorney, which were made exhibits to the applications. The signing of Wilson's name was regarded as a "ministerial act" because of Wilson's authorization to his Deputies "to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney General."

The District Court held that the evidence secured through both wiretaps had to be suppressed for failure of either of the inidviduals who actually authorized the applications to be "identified to Chief Judge Carter, Congress or the public" in the application or orders, as

[416 U.S. 568]

mandated by §§ 2518(1)(a) and (4)(d), respectively. Moreover, evidence obtained under the February 25 wiretap order on the Fernandez phone was separately suppressed, because the Government admitted that "neither the Attorney General nor a specially designated Assistant Attorney General ever authorized the application," as § 2516(1) requires.

The Court of Appeals affirmed in all respects. 478 F.2d 512. With respect to the Chavez tap, the Court of Appeals assumed, as had the District Court, that the Attorney General had personally approved the request for authority to apply for the interception order, as his affidavit stated. Nonetheless, the mis-identification of Assistant Attorney General Wilson as the authorizing official

was deemed to be a "misrepresentation" and an "apparently deliberate deception of the courts by the highest law officers in the land," id., at 515, 517, which required suppression of evidence gathered from the tap for failure to comply with 18 U.S.C. §§ 2518(1)(a) and (4)(d) [18 U.S.C.S. §§ 2518(1)(a) and (4)(d)]. Congress was held to have "intended to eliminate any possibility that the authorization of wiretap applications would be institutional decisions," and the Court of Appeals was fearful that if the mis-identification which occurred in this case were approved, "there would be nothing to prevent future Attorneys General from remaining silent if a particular wiretap proved embarrassing." 478 F.2d, at 516.

[2, 3] We granted certiorari, 412 U.S. 905, 36 L.Ed.2d 969, 93 S. Ct. 2292, to resolve the conflict between the position taken by the Ninth Circuit in this case on the issue of suppression because of inaccurate identification of the officer authorizing the application and the position taken by every other circuit that has considered the question.[2]

2. In other instances where the Attorney General had personally authorized the application, but the application and order erroneously recited approval by Assistant Attorney General Wilson, suppression of wiretap evidence has been denied on the ground of substantial compliance with Title III requirements. United States v. James, 161 U.S. App. D.C. 88, 494 F.2d 1007, 1017 (1974) ("immaterial variance"); United States v. Pisacano, 459 F.2d 259, 264, n. 5 (C.A. 2 1972) ("discrepancy did not meaningfully subvert the congressional scheme"); United States v. Becker, 461 F.2d 230, 235 (C.A. 2 1972) ("harmless error"); United States v. Ceraso, 467 F.2d 647, 652 (C.A. 3, 1972) ("subsequent identification of the authorizing officer is satisfactory"); United States v. Bobo, 477 F.2d 974, 985 (C.A. 4, 1973) ("sufficient compliance"); United States v. Cox, 462 F.2d 1293, 1300 (C.A. 8 1972) ("it is irrelevant that the application and order recited the authorizing officer as Mr. Wilson rather than Mr. Mitchell"). See also United States v. Roberts, 477 F.2d 57, 59 (C.A. 7 1973), holding the authorization improper because given by the Executive

We agree with those other

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courts of appeals that misidentifying the Assistant Attorney General as the official authorizing the wiretap application to be made does not require suppression of wiretap evidence when the Attorney General himself has actually given the approval; hence, we reverse that portion of the judgment suppressing the Chavez wiretap evidence, and remand for further proceedings to permit the District Court to address other challenges to the Chavez wiretap evidence which respondents had made but the District Court did not find it necessary to consider.[3] Because

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the application for the interception order on the Fernandez phone was authorized by the Attorney General's Executive Assistant, rather than by the Attorney General or any specially designated As-

Assistant, not the Attorney General, but suggesting that with respect to the misidentification of Assistant Attorney General Wilson "we would not be inclined to elevate form over substance to find a violation of 18 U.S.C. § 2518(1)(a) and (4)(d) [18 U.S.C.S. § 2518(1)(a) and (4)(d)] . . . ."

3. The record discloses that respondents also based their motions to suppress the Chavez wiretap evidence on the failure of the Government's affidavits in support of the wiretap application to demonstrate a need for wiretapping as opposed to less instrusive means of investigation, 18 U.S.C. § 2518(1)(c) [18 U.S.C.S. § 2518(1)(c)], to particulary describe the communications sought to be intercepted, § 2518(1)(b)(iii), to allege facts sufficient to justify the uncertainty of the termination date for the interception, § 2518(1)(d), or to adequately show probable cause to support the order, § 2518(3); moreover, the sufficiency of the order's directive to minimize the interception of innocent conversations and compliance by the agents who conducted the wiretap with the order of minimization, § 2518(5), were also challenged. R. 159-197. None of these questions is before us now, as neither the District Court nor the Court of Appeals passed on any of them.

sistant Attorney General, on whom alone 18 U.S.C. § 2516(1) [18 U.S.C.S. § 2516(1)] confers such power, evidence secured under that order was properly suppressed for the reasons stated in the opinion filed today in United States v. Giordano, 416 U.S., p. 505, 40 L.Ed.2d 341, 94 S.Ct. 1820. Accordingly, that portion of the judgment suppressing the Fernandez wiretap evidence is affirmed.

II

[1] The application and order for the Chavez wiretap did not correctly identify the individual authorizing the application, as 18 U.S.C. §§ 2518(1)(a) and (4)(d) [18 U.S.C.S. §§ 2518(1)(a) and (4)(d) require. Of this there is no doubt. But it does not follow that because of this deficiency in reporting, evidence obtained pursuant to the order may not be used at a trial of respondents. There is no claim of any constitutional infirmity arising from this defect, nor would there be any merit to such a claim, and we must look to the statutory scheme to determine if Congress has provided that suppression is required for this particular procedural error.

Section 2515 provides that the contents of any intercepted wire or oral communication, and any derivative evidence, may not be used at a criminal trial, or in certain other proceedings, "if the disclosure of that information would be in violation of this chapter."

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Aggrieved persons may move, in a timely manner under § 2518(10)(a), to suppress the use of such evidence at trial on the grounds that:

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under

which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

[4] In United States v. Giordano, supra, we have concluded that Congress, in 18 U.S.C. § 2516(1) [18 U.S.C.S. § 2516(1)], made preliminary approval of submission of wiretap applications a central safeguard in preventing abuse of this means of investigative surveillance, and intentionally restricted the category of federal officials who could give such approval to only the Attorney General himself or any Assistant Attorney General he might specially designate for that purpose. Hence, failure to secure approval of one of these specified individuals prior to making application for judicial authority to wiretap renders the court authority invalid and the interception of communications pursuant to that authority "unlawful" within the meaning of 18 U.S.C. § 2518(10)(a)(i) [18 U.S.C.S. § 2518(10)(a)(i)]. Failure to correctly report the identity of the person authorizing the application, however, when in fact the Attorney General has given the required preliminary approval to submit the application does not represent a similar failure to follow Title III's precautions against the unwarranted use of wiretapping or electronic surveillance and does not warrant the suppression of evidence gathered pursuant to a court order resting upon the application.

[5] There is little question that §§ 2518(1)(a) and (4)(d) were intended to make clear who bore the responsibility for approval of the submission of a particular wiretap

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application. Thus, the Senate Report accompanying the favorable recommendation of Title III states that § 2518

(1)(a) "requires the identity of the person who makes, and the person who authorized the application[,] to be set out. This fixes responsibility." S. Rep. No. 1097, 90th Cong, 2d Sess, 101 (1968). And § 2518(4)(d) "requires that the order note the agency authorized to make the interception and the person who authorized the application so that responsibility will be fixed." Id., at 103. Where it is established that responsibility for approval of the application is fixed in the Attorney General, however, compliance with the screening requirements of Title III is assured, and there is no justification for suppression.

Respondents suggest that the misidentification of Assistant Attorney General Wilson as the authorizing official was calculated to mislead the District Judge in considering the wire interception applications, and certainty had the effect of misleading him, since the interception order also misidentified the authorizing official in reliance on the statements made in the application. We do not perceive any purpose to be served by deliberate misrepresentation by the Government in these circumstances. To the contrary, we think it cannot be seriously contended that had the Attorney General been identified as the person authorizing the application, rather than his subordinate, Assistant Attorney General Wilson, the District Judge would have had any greater hesitation in issuing the interception order. The same could not be said, of course, if, as in Giordano, the correct information had revealed that none of the individuals in whom Congress reposed the responsibility for authorizing interception applications had satisfied this preliminary step. The District Court undoubtedly thought that Wilson had approved the Chavez and Fernandez wiretap applications, and we do not condone the Justice

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Department's failure to comply in full with the reporting procedures Congress has established to assure that its more substantive safeguards are followed.[4] But we cannot say that misidentification was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III.

Neither the District Court nor the Court of Appeals made clear which of the grounds set forth in § 2518(10)(a) was relied upon to suppress the Chavez wiretap evidence. Respondents rely on each of the first two grounds, i.e., that the communications were "unlawfully intercepted" and that the Chavez interception order is "insufficient on its face." Support for the latter claim is drawn from the District Court decision in United States v. Focarile, 340 F. Supp. 1033, 1057-1060 (Md.), aff'd on other grounds sub nom United States v. Giordano, 469 F.2d 522 (C.A. 4, 1972), aff'd, 416 U.S., p. 505, 40 L.Ed.2d 341, 94 S.Ct. 1820, which concluded that an order incorrectly identifying who authorized the application is equivalent to an order failing to identify anyone at all as the authorizing official. We find neither of these contentions persuasive.

[6, 7] Here, the interception order clearly identified "on its face" Assistant Attorney General Wilson as the

4. The Government advises that in the spring of 1972 it revised the form memoranda by which the Attorney General had approved applications for wiretapping or electronic surveillance authority, and the form language in the letters sent to the applying attorneys, which are appended to the applications filed in the district courts, to accurately reflect that approval was obtained from the Attorney General, rather than a specially designated Assistant, unless the latter happens to be the case. Brief for United States in United States v. Giordano 9.

person who authorized the application to be made. Under § 2516(1), he properly could give such approval had he been specially designated to do so by the Attorney General,

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as the order recited. That this has subsequently been shown to be incorrect does not detract from the facial sufficiency of the order.[5] Moreover, even if we were to look behind the order despite the clear "on its face" language of § 2518(10)(a)(ii), it appears that the Attorney General authorized the application, as he also had the power to do under § 2516(1). In no realistic sense, therefore, can it be said that the order failed to identify an authorizing official who possessed statutory power to approve the making of the application.

[8] The claim that communications to and from the Chavez phone were "unlawfully intercepted" is more plausible, but does not persuade us, given the purposes to be served by the identification requirements and their place in the statutory scheme of regulation. Though we rejected,

[7] 5. Respondents' attempt to analogize the facial insufficiency of a search warrant supported by an affidavit submitted under a false name of the affiant, a deficiency which has been held by some courts to require suppression under Fed. Rule Crim. Proc. 41, King v. United States, 282 F.2d 398 (C.A. 4 1960), or under the Fourth Amendment, United States ex rel. Pugh v. Pate, 401 F.2d 6 (C.A. 7 1968), cert. denied, 394 U.S. 999, 22 L.Ed.2d 777, 89 S.Ct. 1590 (1969), to the asserted facial insufficiency of a wire interception order which incorrectly identifies who authorized the application for the order, must fail. Without passing on the soundness of these cases, it must be recalled that the misidentification of the officer authorizing a wiretap application is irrelevant to the issue of probable cause, which is supported by the separate affidavits of investigative officials. See 18 U.S.C. §§ 2518(1) and (3) [18 U.S.C.S. §§ 2518(1) and (3)]. Moreover, no basis is provided in Title III for challenging the validity of the interception order depending on whether the application was approved by the Attorney General rather than a specially designated Assistant.

in Giordano, the Government's claim that Congress intended "unlawfully intercepted" communications to mean only those intercepted in violation of constitutional requirements, we did not go so far as to suggest that every failure to comply fully with any

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requirement provided in Title III would render the interception of wire or oral communications "unlawful." To establish such a rule would be at odds with the statute itself. Under § 2515, suppression is not mandated for every violation of Title III, but only if "disclosure" of the contents of intercepted communications, or derivative evidence, would be in violation of Title III. Moreover, as we suggested in Giordano, it is apparent from the scheme of the section that paragraph (i) was not intended to reach every failure to follow statutory procedures, else paragraphs (ii) and (iii) would be drained of meaning. Giardano holds that paragraph (i) does include any "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." Ante, at 527, 40 L.Ed.2d, at 360.

[9, 10] In the present case, the misidentification of the officer authorizing the wiretap application did not affect the fulfillment of any of the reviewing or approval functions required by Congress and is not within the reach of paragraphs (ii) and (iii). Requiring identification of the authorizing official in the application facilitates the court's ability to conclude that the application has been properly approved under § 2516; requiring identification in the court's order also serves to "fix responsibility" for the

source of preliminary approval. This information contained in the application and order further aids the judge in making reports required under 18 U.S.C. § 2519 [18 U.S.C.S. § 2519].[6] That section requires the judge

6. Section 2519 provides in full:

"§ 2519. Reports concerning intercepted wire or oral communications.

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

"(a) the fact that an order or extension was applied for;

"(b) the kind of order or extension applied for;

"(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(d) The period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

"(g) the nature of the facilities from which or the place where communications were to be intercepted.

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

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who issues or denies an interception order to report his action and certain information about the application, including the "identity of . . . the person authorizing the

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application," within 30 days, to the Administrative Office of the United States Courts, § 2519(1)(f). An annual report of the authorizing officials designated in § 2516 must also be filed with that body, and is to contain the same information with respect to each application made as is required of the issuing or denying judge, § 2519(2)(a). Finally, a summary of the information filed by the judges acting on applications and the prosecutors approving their submission is to be filed with Congress in April of each year by the Administrative Office, § 2519(3). The purpose of

"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions and the number granted or denied;

"(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such reports shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section."

these reports is "to form the basis for a public evaluation" of the operation of Title III and to "assure the community that the system of court1order[ed] electronic surveillance . . . is properly administered. . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., 107. While adherence to the identification reporting requirements of §§ 2518(1)(a) and (4)(d) thus can simplify the assurance that those who Title III makes responsible for determining when and how wiretapping and electronic surveillance should be

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conducted have fulfilled their roles in each case, they do not establish a substantive role to be played in the regulatory system.

Nor is there any legislative history concerning these sections, as there is, for example, concerning § 2516(1), see United States v. Giordano, 416 U.S., at 505, 40 L.Ed.2d, at 341, 94 S.Ct. 1820, to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance. Though legislation to regulate the interception of wire and oral communications had been considered by Congress earlier, the proposed statute drafted for the President's Commission on Law Enforcement and Administration of Justice appears to have been the first proposal to contain a requirement that the application for interception authority should specify "who authorized the application." Task Force Report: Organized Crime, App. C, p. 109, § 3803(a)(1) (1967). That proposed bill, which was substantially followed in Title III, also provided for reports like those now required by 18 U.S.C. § 2519 [18 U.S.C.S. § 2519], including information on "the identity of . . . who authorized the application." Id., at 111, §§ 3804(a)(6) and (b)(1). It did

not, however, require the order to contain this information. Id., at 110, § 3803(e). S. 675, a bill introduced by Senator McClellan on January 25, 1967, as the "Federal Wire Interception Act," 113 Cong. Rec. 1491, did not contain any of these identification requirements. Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 77-78, §§ 8(a), (d), 9(a) (1967). S. 2050, however, a proposal by Senator Hruska to regulate both wiretapping and electronic surveillance, did. Section 2518(a)(1) required an interception application

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to include "the identity of the person who authorized the application," and §§ 2519(a)(6) and (b)(1) provided that judges and authorizing prosecutors report "the identity of . . . who authorized the application," but did not require that the order contain this information, § 2518(e). Hearings, supra, at 1006-1008. The requirement that this information be contained in the order, as well as in the application and required reports, first appeared in § 2518(e)(4) of HR 13482, 90th Cong., 2d Sess. (1967). Though the House never reported out of committee any wiretapping bill, it was retained in S. 917, a combination of S. 675 and S. 2050, whose provisions ultimately were enacted as Title III. Despite the appearance and modification of the identification requirements during the legislative process, however, no real debate surrounded their adoption, and only the statements in S. Rep. No. 1097, supra, that they were designed to fix responsibility, give any indication of their purpose in the overall scheme of Title III. No role more significant than a reporting function designed to

establish on paper that one of the major procedural protections of Title III had been properly accomplished is apparent.

[1] When it is clearly established, therefore, that authorization of submission of a wiretap or electronic surveillance application has been given by the Attorney General himself, but the application, and, as a result, the interception order, incorrectly state that approval has instead been given by a specially designated Assistant Attorney General, the misidentification, by itself, will not render interceptions conducted under the order "unlawful" within the meaning of § 2518(10)(a)(i) or the disclosure of the contents of intercepted communications, or derivative evidence, otherwise "in violation of" Title III within the meaning of § 2515. Hence, the suppression of the Chavez wiretap evidence on the basis

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of the misidentification of Assistant Attorney General Wilson as the authorizing official was in error. Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.

The judgment of the Court of Appeals is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Mr. Justice Douglas, with whom Mr. Justice Brennan,

Mr. Justice Stewart, and Mr. Justice Marshall join, concurring in part and dissenting in part in No. 72-1319, United States v. Chavez, and concurring in No. 72-1057, United States v. Giordano, 416 U.S., p. 505, 40 L.Ed.2d 341, 94 S.Ct. 1820.

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which imposes express limitations on the use of electronic surveillance. In United States v. Giordano the Court correctly finds that the violation of 18 U.S.C. § 2516(1) [18 U.S.C.S. § 2516(1)] is a violation of a statutory requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." The Court also properly finds that a violation of such a statutory requirement mandates suppression of the evidence seized by the unlawful interception. I join the opinion of the Court in Giordano. The same violation of § 2516(1) is also involved in the Fernandez wiretap in United States v. Chavez, and I therefore concur in the Court's suppression of the

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evidence seized in that wiretap. In Chavez, however, the Court finds that suppression is not warranted for the violations of 18 U.S.C. §§ 2518(1)(a) and 2518(4)(d) [18 U.S.C.S. §§ 2518(1)(a) and 2518(4)(d)] which the Court admits occurred in the Chavez wiretap itself. I dissent from this conclusion, hereinafter referred to as the holding of Chavez.

I

Title III permits electronic surveillance to be employed

only pursuant to a court order. It requires, inter alia, that a federal trial attorney desiring to apply to the District Court for such a wiretap order must first secure authorization from one of a group of specified officials in the Justice Department. Giordano represents a class of cases in which authorization for electronic surveillance was given by Sol Lindenbaum, the Executive Assistant to Attorney General John Mitchell, in violation of the "authorization requirement" of § 2516(1) of Title III. This section provides that a wiretap order may be applied for only after authorization by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General." 18 U.S.C. § 2516(1) [18 U.S.C.S. § 2516(1)]. Chavez, on the other hand, represents a class of cases where the Justice Department violated the "identification requirement" of § 2518(1)(a) of Title III, which requires that each application made to the District Court for a wiretap order "shall include . . . the identity of . . . the officer authorizing the application." Id., § 2518(1)(a). Because the District Courts in this class of cases were supplied with misinformation as to the identity of the person who authorized the applications made to them, the orders they entered approving the use of electronic surveillance violated § 2518(4)(d) of Title III, which provides that *such orders "shall specify . . . the identity*

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of . . . the person authorizing the application." (Emphasis added.)

In the Justice Department between 1969 and 1972, a request from a federal trial attorney for authorization to apply for a wiretap order was reviewed in the Criminal Division before being sent to Attorney General Mitchell. According to the Solicitor General, in Chavez Attorney General Mitchell made the operative decision to authorize

the wiretap application and signified this by sending a memorandum to Assistant Attorney General Will Wilson directing Wilson to authorize the trial attorney to submit the application to the District Court. The memorandum,[1] the Solicitor General admits, does not make clear that the operative decision was made in the Attorney General's Office; rather it indicates that Wilson himself was designated to review and authorize the application.

At this point, a letter of authorization was sent to the trial attorney, which clearly identified Assistant Attorney General Wilson, and not Mitchell, as the person who had made the operative decision to authorize the wiretap.[2]

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1. The form memorandum employed by Mitchell stated in part:
"This is with regard to your recommendation that authorization be given to [the particular trial attorney] to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a [particular] period to and from telephone number [the listed telephone numbers of the particular criminal investigation] . . . .
"Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, *you are hereby specially designated to exercise those powers for the purpose of authorizing* [the particular trial attorney] to make the above-described application." (Emphasis added.)

2. The letter sent over Wilson's signature in Chavez read:
"This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs [to intercept wire communications at the particular number involved] . . . .
"I have reviewed your request and the facts and circumstances detailed therein and have determined that there exists probable cause to believe that [named individuals were committing certain offenses] . . . . *I have further determined* that there exists probable cause to believe that the above persons make use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

Wilson, however, neither saw nor authorized

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the Chavez wiretap application or any others; his signature was affixed to the authorization letters by a Deputy Assistant Attorney General, either Harold P. Shapiro or Henry E. Petersen.[3]

When the trial attorney applied for a wiretap order in the District Court, he attached the letter of authorization purportedly signed by Wilson, and naturally misidentified Wilson as the person who had authorized the application to be made,[4] in violation of the identification

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requirement of § 2518(1)(a). As a result, the District Court's order identified Wilson, and not Mitchell, as the Justice Department official who had authorized the trial

"Accordingly, *you are hereby authorized under the power specially delegated to me* in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code [to intercept the described wire communications] . . . ." (Emphasis added.)

3. In Chavez, the letter was signed by Petersen.

4. The application stated:
"[T]he Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A."

attorney to apply for the Chavez wiretap order,[5] in violation of the identification requirement of § 2518(4)(d).

In Chavez, Mitchell first acknowledged responsibility for authorizing the wiretap application in an affidavit filed with the District Court only after respondents had made a motion to suppress the evidence in the tap. Similar affidavits stating that Mitchell had authorized the application, rather than Wilson, were filed by Lindenbaum and Petersen. The courts below, on the strength of these affidavits, have held that Mitchell did in fact authorize the application to be made. Both, however, ordered the evidence which was seized by the surveillance to be suppressed, since the application misidentified Wilson as the responsible official. This Court reverses the Court of Appeals.

II

Deciding a question not reached in Giordano, the Court in Chavez holds that suppression is not dictated when there has been a violation of a provision of Title III which does not, in the view of the courts, "directly and substantially implement the congressional intention to limit the use of intercept procedures" to cases clearly calling for electronic surveillance. I cannot agree that Title III, fairly read, authorizes the courts to pick and choose among various statutory provisions, suppressing

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evidence only when they determine that a provision is "substantive," "central," or

5. The order read in part:
"Special Agents . . . are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, [to intercept wire communications] . . . ."

"directly and substantially" related to the congressional scheme.

Section 2515 of Title III unambiguously provides that no evidence derived from any intercepted communication may be received "in any trial . . . in or before any court . . . if the disclosure of that information would be in violation of this chapter." The Court acknowledges this provision in Chavez, 416 U.S. at 575, 40 L.Ed.2d, at 392, but disregards two sections of Title III explicitly dealing with disclosure in determining when disclosure is in fact "in violation of" Title III. Section 2511(1), which provides criminal penalties for willful violations of Title III, prohibits in § 2511(1)(c) knowing disclosure of communications intercepted in violation of subsection (1), and the subsection prohibits interception "[e]xcept as otherwise specifically provided in this chapter." 18 U.S.C. § 2511(1)(a) [18 U.S.C.S. § 2511(1)(a)]. Section 2517(3) authorizes the disclosure in a criminal proceeding of information received "by any means authorized by this chapter" or of evidence derived from a communication "intercepted in accordance with the provisions of this chapter." The statute does not distinguish between the various provisions of the Title, and it seems evident that disclosure is "in violation of" Title III when there has not been compliance with any of its requirements.

The Court fixes on § 2518(10)(a), which defines the class of persons who may move to suppress the admission of evidence. This section provides that any aggrieved person may move to suppress evidence on the grounds that:

> "(i) the communication was unlawfully intercepted;

> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
> [416 U.S. 586]
> "(iii) the interception was not made in conformity with the order of authorization or approval."

Since paragraphs (ii) and (iii) reach some statutory violations, reasons the Court, paragraph (i) cannot reach all statutory violations or else paragraphs (ii) and (iii) would be "drained of all meaning."

The choice seems to be between attributing to Congress a degree of excessive cautiousness which led to some redundancy in drafting the protective provisions of § 2518(10)(a), or foolishness which led Congress to enact statutory provisions for law enforcement officials to scurry about satisfying when it did not consider the provisions significant enough to enforce by suppression. In view of the express prohibition by § 2515 of disclosure of information "in violation of" the chapter, I would opt for the conclusion that Congress was excessively cautious, and that "unlawfully intercepted" means what it says.

Congress could easily have given the judiciary discretion to apply the suppression remedy only for violations of "central" statutory provisions by using language such as "unlawfully intercepted in violation of important requirements of this chapter" in § 2518(10)(a). But no such limitation appears. Further, the legislative history of Title III emphasizes Congress' intent to enforce every provision of the Title with the remedy provided in §§ 2515 and 2518(10)(a). The Senate Report which accompanied Title III to the Congress states that "Section 2515 . . . imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter,"

and that § 2518(10)(a) together with § 2515 "applies to suppress evidence directly . . . or indirectly obtained in violation of the chapter." S Rep. No. 1097, 90th Cong, 2d Sess, 96 (1968).

Again, no distinction supports the conclusion that Congress considered any provision of Title III more

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important than any other in the applications of the suppression remedy. Congress at no point indicated that it intended to give the courts the discretion to distinguish various provisions of Title III, never suppressing evidence for violations of some—such as §§ 2518(1)(a) and (4)(d)—deemed not "directly and substantially" related to the congressional intent to limit the use of electronic surveillance. No matter how egregious or willful the violation of these provisions, it seems that suppression will not follow, and the Court opens the door to the creation of other non-"central" statutory requirements. This breadth of discretion is not part of the congressional scheme, and the Court oversteps its judicial role when it arrogates such discretion to itself.

III

Moreover, even under the test the Court defines in Chavez, that violations of only those statutory provisions "directly and substantially" limiting the use of electronic surveillance will warrant suppression, the violation of the identification requirements of §§ 2518(1)(a) and (4)(d) mandates suppression in Chavez. For the requirement of § 2518(1)(a) that the application for a wiretap "shall include . . . the identity of . . . the officer authorizing the application" together with that of § 2518

(4)(d) that the wiretap order contain the same information significantly implements the congressional intention to limit the use of electronic surveillance procedures.

In support of its conclusion that suppression is not mandated by the §§ 2518(1)(a) and 2518(4)(d) violations in Chavez, the Court states that while Congress expressed the intent that these provisions "fix responsibility" on the person who authorized the employment of electronic surveillance, "[w]here it is established that responsibility for approval of the application is fixed

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in the Attorney General, however, compliance with the screening requirements of Title III [§ 2516] is assured, and there is no justification for suppression." Ante, at 572, 40 L.Ed.2d, at 390. To the Court, the provisions "do not establish a substantive role to be played in the regulatory system. . . . No role more significant than a reporting function designed to establish on paper that one of the major procedural protections of Title III [the authorization requirement of § 2516] had been properly accomplished is apparent." Ante, at 578, 579, 40 L.Ed. 2d, at 394.

The Court reduces the statement of Congress that the identification provisions were created to "fix responsibility" for a wiretap authorization to meaning only that the provisions were drafted to assure the courts that there had been compliance with the authorization requirement of § 2516. And the Court finds it satisfactory that this responsibility is established by an ex post facto affidavit of the Attorney General, stating that he in fact authorized the Chavez surveillance.

It seems to me a complete misreading of Congress' attempt to "fix responsibility" in the application and order

to reach these conclusions. Sections 2518(1)(a) and 2518(4)(d) are not part of the detailed and stringent guidelines of Title III through legislative inadvertence. They were not present in early proposals to regulate wiretapping, but were carefully inserted in later proposals, culminating in the draft which became Title III. A 1961 proposal to allow wiretapping under regulated conditions did not contain any identification requirement, although it contained provisions designating those who could authorize surveillance.[6] S 675, introduced in the 90th Congress

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by Senator McClellan on January 25, 1967, 113 Cong Rec 1491, did not require either the application or the court order to identify the person who authorized the surveillance application.[7] S 2050, introduced five months later by Senator Hruska, 113 Cong Rec 18007, expressly required that the application to the court set forth "the identity of the person who authorized the application," but did not require the court order to contain this information.[8] HR 13482, introduced in the House on October 12, 1967, 113 Cong Rec 28792, not only required that the application identify the person authorizing it, but also that the court order contain this information. Six months later, on April 29, 1968, the Senate Judiciary Committee

6. S. 1495, 87th Con., 1st Sess., § 4(b), printed in Hearings on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Con., 1st Sess., 4, 5 (1961).

7. Printed in Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 75 (1967).

8. Printed in Hearings, supra, n. 7, at 1006.

reported S 917, whose provisions ultimately were enacted as Title III, accompanying the bill with an extended report explaining every provision.[9] Though it noted that Title III is "essentially a combination" of S 675 and S 2050,[10] the Judiciary Committee went beyond either of those bills as to the identification requirements, mandating that both the application and the order identify the person who authorized the application.

In its discussion of the authorization requirement of § 2516, the Senate Report states:

> "This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will
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> avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S Rep No. 1097, 90th Cong, 2d Sess, 97 (1968).

But this alone was not sufficient. The Report continues:

> "The application must be made to a Federal judge of competent jurisdiction, as defined in section 2510(9), discussed above. *The application must conform to section 2518, discussed below.*" Ibid. (Emphasis added.)

The Committee's discussion of § 2518 states;

> "Section 2518 of the new chapter sets out in de-

9. S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).

10. Id., at 66.

tail the procedure to be followed in the interception of wire or oral communications.

. . . . .

"Subparagraph [2518(1)(a)] *requires* the identity of the person who makes, and the person who authorized the application to be set out. *This fixes the responsibility*.

* * *

"Subparagraph [2518(4)(d)] *requires* that the order note the agency authorized to make the interception and the person who authorized the application *so that responsibility will be fixed*." Id., at 100, 101, 103. (Emphasis added.)

The crucial concept is Congress's expression of intention that §§ 2518(1)(a) and (4)(d) should be complied with, so that the application and order would fix responsibility.

Clearly, no such responsibility was fixed on Mitchell, the authorizing official, in Chavez. As the Court of Appeals

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noted, United States v. Chavez, 478 F.2d 512, 515, 516, there

"was a misrepresentation, in circumstantial and carefully phrased detail, all pointing to Wilson as the officer authorizing the application, when in fact he did no such thing.

". . . The Wilson letter and the Mitchell memorandum . . . create the illusion of compliance with the Act. Without Mitchell's affidavit, the lines of responsibility lead to Wilson, not to Mitchell."

Yet Wilson never saw the application for which Mitchell now accepts responsibility. Before the affidavits submitted to the District Court in response to the motion to suppress, about one year after the application was initially authorized, responsibility pointed directly at Wilson, and no document implicated Mitchell.

It is simply not enough that Mitchell's responsibility is established only after a prosecution is underway and a motion to suppress filed. After-the-fact acceptance for the Chavez surveillance was made at no cost. The surveillance was productive and was directed against an alleged drug trafficker, a pariah of society. Accepting responsibility at this point further helped Mitchell and the Justice Department avoid the acute embarrassment of losing this prosecution. But this was not the scheme created by the Congress. By creating the identification provisions, which required the authorizing official to be made known at the time of an application, it established a mechanism by which a person's responsibility was to be ackowledged immediately, not a device by which the identity of the person authorizing the application would remain hidden until it was discovered that an instance of electronic surveillance had been productive and not offensive to public sensibilities.

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Immediate acknowledgment of responsibility for authorizing electronic surveillance is not an idle gesture. It lessens or eliminates the ability of officials to later disavow their responsibility for surveillance. By adding the identification provisions of § 2518, Congress took a step toward stripping from responsibe officials the ability to choose after the fact whether to accept or deny that responsibility by coming forward and filing an affidavit. "Fixing" of re-

sponsibility in the application and order can have no other meaning; it simply does not comprehend a situation where responsibility is concealed or unsettled. Had Congress been content with compliance with § 2516 being proved and responsibility for surveillance being established by later testimony and affidavits, it could easily have left the legislation in its early form without adding the express requirements of §§ 2518(1)(a) and (4)(d) to the Act.[11]

The Court's treatment of the identification requirements trivializes Congress' efforts in adding them to Title III. In Giordano, the Court relies on Congress' clearly expressed desire that an official, responsible to the political process, should make the decision authorizing electronic surveillance and bear the scrutiny of Congress and the public for that decision. As noted, the Senate Report which accompanied Title III to Congress stated that § 2516 "centralizes in a publicly responsible official subject to the political process" the formulation of electronic surveillance policy so that "[s]hould abuses occur, the lines or responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing

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that no abuses will happen." S.Rep.No. 1097, 90th Cong, 2d Sess, 97 (1968). Similarly, Senator Long, in support of the bill, read from a report which stated: "We agree that responsibility should be focused on those public officials who will be principally accountable to the courts and the

11. The Court in Chavez finds some guidance in the fact that "no real debate surrounded" the adoption of the identification requirements. This is not surprising, in that the provisions were added to wiretapping legislation in committee, and justified in the Judiciary Commitee's report.

public for their actions."[12] Speaking to a related provision requiring that politically responsible state prosecuting officials authorize state applications, Professor Blakey of Notre Dame, instrumental in the drafting of Title III, stated:

> "Now, the reason [for this requirement] is that unless we involve someone in the process of using this equipment who is politically responsible, that is, someone who must return to the people periodically and be reelected, it seems to me we miss a significant check on possible abuse. As a practical matter, if there is police abuse, the remedies that we can take against them are limited. If we involve the responsible judgment of a political official in the use of this equipment, and it is then abused, the people have a very quick and effective remedy at the next election."[13]

But it is clear that this personal responsibility and political accountability, relied on by Congress to check the reckless use of electronic surveillance, is rendered a mere chimera when the official actually authorizing a wiretap application is not identified until years after the

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tap has occurred, when he might already be out of office, when the usefullness of the tap is already established, when it is clear that the surveillance was not abusive, and then only through voluntary admissions or the sifting of potentially contradictory affidavits. Responsibility is hardly

12. 114 Cong. Rec. 14474. The Report was by the Association of the Bar of the City of New York, Committee on Federal Legislation, Committee on Civil Rights, entitled "Proposed Legislation on Wiretapping and Eavesdropping after Berger v. New York and Katz v. United States."

13. Hearings on Anti-Crime Program before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1380 (1967).

"focused," and the "lines of responsibility" are gossamer at best. This is why Congress added the demand that responsibility be immediately *fixed*. The procedures which the Court sanctions in Chavez stretch the unequivocally expressed desire of Congress to *fix responsibility* in the application and order well beyond the breaking point.

In eviscerating Congress' intent to fix responsibility in the application and order, the Court destroys a significant deterrent to reckless or needless electronic surveillance. It allows the official authorizing a wiretap to remain out of the harsh light of public scrutiny at the crucial beginning of the wiretap process, only to emerge later when he chooses to identify himself. Knowledge that personal responsibility would be immediately focused and immutably fixed, whatever the outcome of surveillance, be it profitable or profligate, successful or embarrassing, forces an official to be circumspect in initially authorizing an electronic invasion of privacy. This is why Title III requires more than a judicial determination of probable cause; it also requires an accountable political official to exercise political judgment, and it requires that the political official be immediately identified and his responsibility fixed when an application is filed. The identification procedures, by fixing responsibility, obviously serve to "limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device," thereby requiring suppression even under the test the Court adopts in Chavez.

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IV

The Court mentions in passing the reporting requirements of Title III, noting the information furnished the judge pursuant to § 2518(1)(a) is useful in making the

reports required of him under § 2519. This section requires the judge to report, inter alia, the name of the party who authorized each wiretap application made to him to the Administrative Office of the United States Courts within 30 days after surveillance has been completed. 18 U.S.C. § 2519(1)(f) [18 U.S.C.S. § 2519(1)(f)]. At the same time, 18 U.S.C. § 2519(2) [18 U.S.C.S. § 2519(2)] requires the authorizing prosecuting officials designated in § 2516 to file a report in January of each year, which also must include the name of the person who authorized applications made during the previous calendar year. In reliance on this information, the Administrative Office is to report such information to the Congress for public scrutiny. § 2519(3). Like the applications and wiretap orders themselves, this report is to include the names of those persons responsible for authorizing electronic surveillance.

In the set of cases represented by Chavez, of course, the person actually authorizing the applications, Mitchell, was not made known to the courts which approved them, and so the reports filed with the Administrative Office by the judiciary did not identify him as the responsible official. The potential for public accountability through this channel was foreclosed by the misinformation given the courts. While the report filed by the office of the Attorney General in January 1970 did state that the 1969 applications filed in Wilson's name had been personally approved by Mitchell, the Solicitor General informs us that the reports filed by the Attorney General regarding instances of electronic surveillance for 1970 and after, including the Giordano wiretap (1970) and the Chavez tap (1971), did not acknowledge that

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Mitchell had personally authorized the surveillance attributed to his subordinates.[14] The failure of the Attorney General's office to document the actual personal responsibility of Mitchell for surveillance authorizations occurred as those authorizations proliferated: there were only 34 instances of federal surveillance reported under Title III for 1969, but that number rose to 183 in 1970 and 238 in 1971.[15] Ex post facto acknowledgement of responsibility by Mitchell in the annual reports filed pursuant to § 2519(2) could not, of course, cure the violation of the express congressional mandate of § 2518(1)(a), any more than did Mitchell's filing of an affidavit. Nevertheless, not even these reports for years after 1969 provided documentation that Mitchell was the Justice Department official actually responsible for authorizing electronic surveillance. While Congress demanded the openness of political accountability, Justice Department documents drew a veil of secrecy, and no personal responsibility was attributed in any documents to Mitchell, the person actually responsible for authorizing the electronic surveillance.

V

As the Court recognized in Gelbard v. United States, 408 U.S. 41, 48, 33 L.Ed.2d 179, 92 S.Ct. 2357, the protection of privacy was an overriding concern of Con-

14. The Administrative Office, nonetheless, repeated the statement made for 1969 that Mitchell had "personally" authorized the applications.

15. See Administrative Office of United States Courts, Reports on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, 1969, 1970, 1971.

gress when it established the requirements of Title III in 1968:

> "The need for comprehensive, fair and effective reform setting uniform standards is obvious. New
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> [416 U.S. 597]
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> protections for privacy must be enacted." S. Rep. No. 1097, 90th Cong., 2d Sess., 69.

Electronic surveillance was a serious political issue, and these detailed and comprehensive requirements are not portions of a hastily conceived piece of legislation. As noted above, electronic surveillance legislation was introduced long before 1968, and the provisions of Title III are the culmination of a long evolutionary process. The Title was accompanied by an exhaustive and studied report in which the Senate Judiciary Committee offered an explanation and justification for each clause of the bill. I cannot believe that Congress perversely required law enforcement officials to jump through statutory hoops it considered unnecessary to the goal of protecting individual privacy from unwarranted electronic invasions.

On the contrary, the history of Title III reflects a desire that its provisions be strictly construed. Senator McClellan, sponsor of S. 675, one of the bases of Title III, and chairman of the committee which reported Title III to Congress, stated during hearings on his bill:

> "I would not want any loose administration of this law.
>
> . . . . .
>
> "But [would] have it very strictly observed. It is not to become a catchall for promiscuous use. I want

to see this law strictly observed with the courts adhering to the spirit and intent of it in granting the orders.

. . . . . .

"I think it ought to be tight, very definitely as free from loop-holes as it can possibly be made . . . ."[16]

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Subsequently, McClellan's committee closed yet another loophole in the law by inserting the identification requirements of Title III, attempting thereby to fix responsibility at the time of the application for a wiretap order, requirements which this Court now nullifies.

Mr. Justice Holmes observed in dissent 70 years ago:

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their

16. Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 508, 869. In addition, in reporting to the Senate in 1969 on the operation of Title III during its first year, Senator McClellan stated:

"I do, however, want to admonish every law enforcement officer, prosecutor, and judge involved in this area that the only way this legislation will be effective in combating crime is by strict adherence to the standards it contains.

. . . . . .

". . . This is an invaluable and powerful tool that must not be subjected to abuse. Those who violate the standards can and must either be punished and if they cannot learn to follow the law they must face loss of this law enforcement tool. . . .

. . . . . .

"Mr. President, my purpose in making these remarks has been to help assure that this legislation will be, in fact, followed to the strictest letter of the law—both bringing criminals to book and protecting citizens' privacy. That is the only way in which it can be utilized as an effective tool in reducing crime. . . . Let us make sure that none of those who may be convicted can ask for a reversal because the law was not strictly followed." 115 Cong. Rec. 23241-23242.

real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Northern Securities Co. v. United States, 193 U.S. 197, 400-401, 48 L.Ed. 679, 24 S.Ct. 436.

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The Solicitor General reminds us that substantial effort on the part of the Organized Crime Section of the Criminal Division of the Department of Justice is implicated, for the violations of Title III reflected in these two cases are not isolated occurrences. The failure of Attorney General Mitchell properly to authorize applications involves 60 cases and 626 defendants. The failure of surveillance applications to fix responsibility on Mitchell, when he did in fact authorize the applications, involves an additional 99 cases and 807 defendants. Yet the magnitude of the effect of suppression of unlawfully obtained evidence for these violations of Title III does not vitiate our duty to enforce the congressional scheme as written. The failure of a prosecution in a particular case pales in comparison with the duty of this Court to nourish and enhance respect for the evenhanded application of the law. I accordingly dissent in part in Chavez.

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